

# Brooklyn Law Review

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Volume 86 | Issue 1

Article 5

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12-31-2020

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### Recommended Citation

Dru Stevenson, *Going Gunless*, 86 Brook. L. Rev. (2021).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol86/iss1/5>

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# Going Gunless

Dru Stevenson<sup>†</sup>

*“I have told my sons that they are not under any circumstances to take part in massacres, and that the news of massacres of enemies is not to fill them with satisfaction or glee.*

*I have also told them not to work for companies which make massacre machinery, and to express contempt for people who think we need machinery like that.”<sup>1</sup>*

## INTRODUCTION

I want to waive my Second Amendment rights. I want to do this not because I want to restrict the freedom or behaviors of others, but because I feel overwhelming disgust and revulsion toward guns and what they have become in our society. Yet there is no legal mechanism for effective, binding waiver—or renunciation—of these rights. Our legal system provides procedures or circumstances by which one can waive other constitutional rights, such as trial rights found in the Fifth, Sixth, and Seventh Amendments, rights against searches and seizures under the Fourth Amendment, and, effectively, waiver of certain First Amendment rights. In fact, some constitutional rights, according to the courts, include a constitutional right *not* to do the activity, like free speech or religious expression.<sup>2</sup> This article proposes a system for voluntary government registration

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<sup>1</sup> KURT VONNEGUT JR., *SLAUGHTERHOUSE FIVE* 19 (1969).

<sup>2</sup> See Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 18–24 (2012) [hereinafter Blocher, *The Right Not to Keep or Bear Arms*] (surveying constitutional rights not to do the activity protected by the same provision, and arguing that the Second Amendment could be a two-way right). See generally Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761 (2012) (exploring two-way constitutional rights generally).

and certification of non-gun owners, those who for religious, moral, social, or philosophical reasons want to be ineligible to buy or possess firearms for a period of five or ten years. The voluntary legal ineligibility would also apply to state permits and licenses for buying, owning, carrying, or hunting with firearms. It would constitute a waiver of all Second Amendment rights, with a government-issued certificate or card that the person is legally “gunless.”<sup>3</sup>

Other authors, most notably Fredrick Vars, have proposed temporary self-enlistment on the federal National Instant Criminal Background Check System (NICS) for those struggling with suicidal thoughts or feelings.<sup>4</sup> Some state legislatures have also shown interest in voluntary systems that temporarily limit an individual’s gun ownership rights. My proposal is much broader, more permanent, and involves the government issuance of official certification cards. It also serves a different purpose for several reasons.<sup>5</sup>

First, this proposal would help create social identification markers for the anti-gun movement, something that, at least historically, has been missing.<sup>6</sup> Formal signals and labels of identification with a movement are necessary for a movement’s success.<sup>7</sup> Think of the sociolinguistic function of the word “vegan.”

<sup>3</sup> This term seems appropriate because it is precisely descriptive, and it has already been appearing in some cases and the legal academic literature. *See, e.g.*, *Raygoza v. Cty of L.A.*, 21 Cal. Rptr.2d 896, 899 (Cal. Ct. App. 1993) (“gunless deputy”); *Souza v. Howard*, 488 F.2d 462, 463 (1st Cir. 1973) (“gunless robber”); Brian Charles Lea, *The Merits of Third-Party Standing*, 24 WM. & MARY BILL RTS. J. 277, 303 (2003) (“gunless[] neighborhood watch”).

<sup>4</sup> *See* Ian Ayres & Fredrick E. Vars, *Libertarian Gun Control*, 167 U. PA. L. REV. 921, 922 (2019); Fredrick E. Vars, *Not Young Guns Anymore: Dementia and the Second Amendment*, 25 ELDER L.J. 51, 66 (2017); Angela Selvaggio & Fredrick E. Vars, “*Bind Me More Tightly Still*”: *Voluntary Restraint Against Gun Suicide*, 53 HARV. J. ON LEGIS. 671, 673 (2016); Fredrick E. Vars, *Self-Defense Against Gun Suicide*, 56 B.C. L. REV. 1465, 1469 (2015) [hereinafter Vars, *Self-Defense Against Gun Suicide*].

<sup>5</sup> Fredrick Vars and Ian Ayres have mentioned political self-expression and associational signaling as secondary advantages of their self-registration proposal. At the same time, the primary stated purpose of their proposal is to reduce suicide, and several components of their proposal reflect that priority. *See, e.g.*, Ayres & Vars, *supra* note 4, at 948, 966; Ian Ayres & Frederick Vars, *How a “No Guns” Registry Could Help Prevent Firearm-Related Suicides*, BROOKINGS (June 20, 2017), <https://www.brookings.edu/research/how-a-no-guns-registry-could-help-prevent-firearm-related-suicides/> [https://perma.cc/ZH3D-BMMY]. This article takes these secondary points from the Vars–Ayres proposal and focuses on them, adding some additional related ideas.

<sup>6</sup> *See generally* KRISTIN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA* (2006) (discussing the failure of the gun control movement to coalesce into an effective grassroots movement or organization).

<sup>7</sup> *See* Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340 (2000) [hereinafter McAdams, *An Attitudinal Theory*] (“[L]aw changes behavior by signaling the underlying attitudes of a community or society. Because people are motivated to gain approval and avoid disapproval, the information signaled by legislation and other law affects their behavior.”); Richard H. McAdams, *A Focal Point*

When someone mentions that they are vegan, the hearers can infer a full set of implications; the individual has made a conscious, deliberate choice about this (we do not use “vegan” for someone who simply happens, perhaps due to poverty or food access, to have no meat or dairy in their diet at that time), a choice based on some larger underlying values, such as morality, a sense of identity, health priorities, and heritage. We also know that the self-identified vegan has had to make a cascade of other day-to-day decisions in order to implement their vegan lifestyle—it affects what restaurants they choose, where they buy groceries, and even what types of social events they frequent (barbeques might be infrequent for them compared to others).

We do not have an equivalent to the word “vegan” for gun ownership, but many of us feel strongly that we should not own guns and we have made situational or social choices applying this conviction. We are gunless by conviction, not by happenstance. The Supreme Court’s *District of Columbia v. Heller* opinion acknowledged, in both the majority and dissenting opinions, that the original draft of the Second Amendment contained an exemption for those “religiously scrupulous of bearing arms,” also known as the conscientious objector exception.<sup>8</sup> *Heller* attributes the clause only to Quakers,<sup>9</sup> though its generalized phrasing covered multiple religious groups that at the time forbade their followers from participating in military service. The majority was correct, of course, in observing that “Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever—so much so that Quaker frontiersmen were forbidden to use arms to defend their families.”<sup>10</sup> In our modern legal system, we have conscientious objectors for both secular and religious reasons who would not want to bear arms for personal self-defense *or* to participate in military combat. The proposal in

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*Theory of Expressive Law*, 86 VA. L. REV. 1649, 1651 (2000) (stating law helps people coordinate activities by creating signals to interpret and predict others’ actions).

<sup>8</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 589–90 (2008); *id.* at 661 (Stevens, J., dissenting).

<sup>9</sup> *Id.* at 591 (majority opinion); *id.* at 660 (Stevens, J. dissenting) (noting Madison dropped the conscientious objector clause when others objected that government officials could thereafter designate certain unpopular groups as “religiously scrupulous” and then force them to disarm).

<sup>10</sup> *Id.* at 590 (majority opinion); see also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1468–69 (1990) (discussing early American legal concessions to nonviolent Moravians, Quakers, and Mennonites); Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367, 375–76 (1993) (describing the tolerance of conscientious objectors from Quaker, Brethren, and Mennonite groups).

this article enables them to identify themselves as such—those whom the Framers dubbed “scrupulous of bearing arms.”

In addition, voluntary registration as gunless would be a personal moral commitment marker, analogous to declaring oneself a conscientious objector for military service. Our legal system, through statutes, regulations, and decisional caselaw, recognizes “conscientious objectors” to military combat duty.<sup>11</sup> Marking our personal moral commitments with formalities, ceremonies, and oaths is a practice across cultures. Such markers serve an important psychological purpose, strengthening our resolve thereafter and making the decision part of our sense of self. This is a mechanism to turn a choice into an identity—part of our persona. Formalities also serve an *ex ante* purpose, highlighting for ourselves the gravity of the commitment we are about to make.

Third, there is the market-signaling effect, providing useful information that can trigger a response from the private sector. Suppose, for example, that liability insurers could identify with certainty who was gun-free, and could apply an actuarial-based market response in terms of pricing their premiums, both for individual policyholders and for businesses that find ways to favor gunless employees, customers, subcontractors, etc. Religious organizations with strong positions disavowing interpersonal violence could also have their own type of nonprofit market response, viewing certified gunlessness as a factor for clergy ordination, sacramental duties, and other religious activities. Analogously, but less commonly, obtaining certification as gunless may help avoid wrongful convictions or arrests, especially for members of communities that experience such tragedies disproportionately. One effect I am *not* worried about is that those who register as gunless will become easy or tempting targets for criminals; empirical evidence suggests that gun ownership attracts, rather than deters, criminals.<sup>12</sup>

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<sup>11</sup> See 32 C.F.R. § 1630.11 (Class 1–A–0: Conscientious objector available for noncombatant military service only); 32 C.F.R. § 1630.17 (Class 1–O–S: Conscientious objector to all military service); 32 C.F.R. § 1630.18 (alternative service for conscientious objectors is available); *see also* *Welsh v. United States*, 398 U.S. 333, 340 (1970) (holding beliefs which are “purely ethical or moral,” even if not religious, which impose a moral duty to refrain from “participating in any war at any time,” make conscientious objector exemption applicable); *United States v. Seeger*, 380 U.S. 163, 185–87 (1965) (upholding moral but irreligious objection to combat as valid under the exemption); *United States v. Macintosh*, 283 U.S. 605, 633 (1931) (“[I]n the forum of conscience, duty to a moral power higher than the State has always been maintained.”), *overruled in part by* *Girouard v. United States*, 328 U.S. 61 (1946).

<sup>12</sup> See David Hemenway et al., *Whose Guns Are Stolen? The Epidemiology of Gun Theft Victims*, 4 INJ. EPIDEMIOLOGY 1 (2017) (“Risk factors for having a gun stolen were owning [six] or more guns, owning guns for protection, carrying a gun in the past

The discussion that follows begins with a brief description of the mechanics of the proposal itself in Part I, and situates it within the context of the larger firearm regulation regime that is currently in place, especially as it relates to the background check system for gun purchases. Of course, if the proposal were to become a reality, it would undoubtedly require some refinements. Nevertheless, for the sake of starting the discussion, Part II sets forth the tentative features or components of the new system, including specific statutory and regulatory amendments that would be necessary.

Part III explains the three main benefits of this proposal, in turn: first, social identification markers to facilitate the growth and cohesiveness of an anti-violence movement;<sup>13</sup> second, the solemnization and self-signaling effect of an official commitment, and;<sup>14</sup> third, the baleful market-signaling effects—that is, removing information deficits in a way that would encourage market-based responses.<sup>15</sup> In addition, a fourth type of aggregated benefit, reducing various social costs of gun prevalence through voluntary reduction of the number of guns,<sup>16</sup> rounds out Part III. Each of these could serve as a standalone reason for the proposal, and together they form a compelling case. The three main advantages—social identity, personal resolve or self-signaling, and improved market responses—all target those who already hold the position that gun ownership is, on balance, socially and personally harmful, or even wrongful. The aggregated fourth benefit refers to a grouping of social costs or externalities of personal gun ownership,<sup>17</sup> such as the disturbingly widespread problem of firearm theft,<sup>18</sup> which constantly replenishes the

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month . . . .”); Bruce Sacerdote, *Comment*, in *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE* 107, 108–09 (Jens Ludwig & Philip J. Cook eds., 2003) (reviewing empirical research suggesting that guns create an inducement to burglary rather than a deterrent); Philip J. Cook & Jens Ludwig, *Guns and Burglary*, in *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE*, *supra* note 12, at 74, 78 (“At the same time guns are of considerable value to burglars, who typically prefer items that are easy to carry, easily concealed, and have high ‘pound for pound value.’”).

<sup>13</sup> See *infra* Section III.A.

<sup>14</sup> See *infra* Section III.B.

<sup>15</sup> See *infra* Section III.C.

<sup>16</sup> See *infra* Section III.D.

<sup>17</sup> See *infra* Section III.D. See generally Philip J. Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, 90 J. PUB. ECON. 379, 389–90 (2006) (using statistical analysis to derive an average annual social cost of household gun ownership between \$100 and \$1,800, depending on varying elasticity rates for homicide with respect to firearm prevalence, and assuming \$1 million value for each life lost).

<sup>18</sup> See BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, U.S. DEP’T OF JUSTICE, 2012 SUMMARY: FIREARMS REPORTED LOST AND STOLEN 2 (2012), <https://www.atf.gov/resource-center/docs/2012-firearms-reported-lost-and-stolenpdf-1/download> [<https://perma.cc/WK27-WMUH>]; Martin Kaste, *More Guns in Cars Mean More Guns Stolen From Cars*, NPR (May 9, 2019), <https://www.npr.org/2019/05/09/717178960/more->

supply of guns used in crimes and sold on the black market.<sup>19</sup> Lawfully-owned guns also become crime guns when law-abiding owners make tragic, impulsive decisions in a state of rage,<sup>20</sup> intoxication,<sup>21</sup> or despair, which may not be foreseeable at the time of purchase. Gun suicides number more than twenty thousand per year,<sup>22</sup> and the correlation of firearm availability (i.e., present in the home), with suicide is well-documented.<sup>23</sup> Unrelated to crime, there are other alarming social costs of gun prevalence, such as the disturbingly high number of accidental firearm injuries, which are estimated in the tens of thousands per year, with hundreds resulting in death.<sup>24</sup>

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guns-in-cars-mean-more-guns-stolen-from-cars [https://perma.cc/8WDE-J7J3] (reporting that an “NPR survey of a sampling of police departments reveals steady increases in reports of guns stolen from vehicles”).

<sup>19</sup> See Brian Freskos, *Guns Are Stolen in America Up to Once Every Minute. Owners Who Leave Their Weapons in Cars Make It Easy for Thieves*, TRACE (Apr. 20, 2018), <https://www.thetrace.org/2016/09/stolen-guns-cars-trucks-us-atlanta> [https://perma.cc/3DYU-7YN8] [hereinafter Freskos, *Stolen Guns in America*] (detailing the increase in gun thefts, especially from cars, in states that liberalize firearm-carry laws); Brian Freskos, *Missing Pieces: Gun Theft from Legal Owners Is on the Rise, Quietly Fueling Violent Crime Across America*, TRACE (Nov. 20, 2017), <https://www.thetrace.org/features/stolen-guns-violent-crime-america> [https://perma.cc/JSZ9-QT5A].

<sup>20</sup> See John J. Donohue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control*, 16 J. EMPIRICAL LEGAL STUD. 198, 204–07 (2019) (discussing pathways by which law-abiding gun carriers become criminally violent, with specific examples).

<sup>21</sup> See Maria Oquendo, *Opioid Use Disorders and Suicide: A Hidden Tragedy*, NAT’L INST. DRUG ABUSE (Apr. 20, 2017), <https://www.drugabuse.gov/about-nida/noras-blog/2017/04/opioid-use-disorders-suicide-hidden-tragedy-guest-blog> [https://perma.cc/3T56-C9T9]; Haley Weiss, *The Disturbing Trend Behind America’s Soaring Gun Deaths*, ATLANTIC (Dec. 21, 2018), <https://www.theatlantic.com/health/archive/2018/12/gun-deaths-city-murders-suicides/578812> [https://perma.cc/CX39-5R64].

<sup>22</sup> See Joseph A. Simonetti & Ali Rowhani-Rahbar, *Limiting Access to Firearms as a Suicide Prevention Strategy Among Adults: What Should Clinicians Recommend?*, JAMA NETWORK (June 7, 2019), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2735457> [https://perma.cc/2PNT-NDDP].

<sup>23</sup> See PHILIP J. COOK & KRISTIN A. GOSS, *THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW* 42–43 (2014); Ian Ayres, *Libertarian Gun Control*, FORBES (Sept. 1, 2015), <https://www.forbes.com/sites/whynot/2015/09/01/libertarian-gun-control/#3ca25a205bf3> [https://perma.cc/2AF4-9NWQ]; A.B.A., *Standing Comm. on Gun Violence, Resolution 19M106B–NICS Self Reporting* (Apr. 1, 2019) [hereinafter A.B.A., *Resolution 19M106B*] (discussing suicide statistics); *The Relationship Between Firearm Availability and Suicide*, RAND CORP. (Mar. 2, 2018), <https://www.rand.org/research/gun-policy/analysis/essays/firearm-availability-suicide.html> [https://perma.cc/27QR-HJUE].

<sup>24</sup> See, e.g., Jacob B. Avraham et al., *The Epidemiology of Firearm Injuries Managed in US Emergency Departments*, 5 INJ. EPIDEMIOLOGY 1 (2018) (“Firearm injuries increased from 2009 to 2012, driven by adults aged 18-to-44-years-old, and disproportionately impacting lower socioeconomic communities. Injuries also increased among young children.”); DAVID HEMENWAY, *PRIVATE GUNS, PUBLIC HEALTH* 27–34 (2d ed. 2017) (surveying public health research); Faiz Gani & Joseph K. Canner, *Trends in the Incidence of and Charges Associated with Firearm-Related Injuries Among Pediatric Patients, 2006–2014*, 172 JAMA PEDIATRICS 1195, 1195 (2018) (demonstrating that firearm injuries to children cost \$270 million in hospital charges annually); *How Gun Policies Affect Unintentional Injuries and Deaths*, RAND CORP. (Apr. 22, 2020), <https://www.rand.org/research/gun-policy/analysis/unintentional-injuries.html> [https://perma.cc/27QR-HJUE] (showing the number of emergency room discharges for nonfatal firearm injuries); Madeline Drexler, *Guns & Suicide: The*

The proposal outlined here is low-cost but promises high benefits; it supplies something that has been missing up until now in our firearm policy and public discourse, while not infringing on anyone's Second Amendment rights. We are in dire need of an official mechanism to designate one's permanent choice not to own firearms, a need that this proposal aims to fill.

# I. THE PROPOSAL: VOLUNTARY REGISTRATION OF NONOWNERS OF GUNS

*“Normalizing the idea that we should all go around capable of a lethal act at any moment is completely corrupt and crazy. I wouldn’t carry a gun. The reason I wouldn’t carry a gun is because it is an immoral act walking around imagining you’re going to kill someone. It’s a recipe for a completely deranged society. It’s grotesque.”*<sup>25</sup>

Many people are without guns by happenstance—they simply have not acquired one yet, but may in the future, and others simply prefer to spend their money on other things. Under federal law, millions of individuals with prior felony convictions cannot legally possess a firearm, nor can undocumented immigrants, those adjudicated mentally ill, those under a domestic violence restraining order, or those with a domestic violence misdemeanor.<sup>26</sup> Some of us, however, do not have firearms because of personal convictions, even when firearm purchases would be lawful, convenient, and affordable for us. The proposal outlined in this Part is for these individuals.

There is a movement—albeit a disorganized and incredibly diverse movement—of those who oppose gun ownership due to its contribution to the epidemic of gun violence. Many, like the youth movements that emerged after the Parkland school massacre, are reacting against gun violence in our society. For some, like this author, the conviction against firearm use derives from religious beliefs.<sup>27</sup> Several faiths, or at least subdivisions or denominations

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*Hidden Toll*, HARV. PUB. HEALTH, [https://www.hsph.harvard.edu/magazine/magazine\\_article/guns-suicide/](https://www.hsph.harvard.edu/magazine/magazine_article/guns-suicide/) [<https://perma.cc/5QK9-729Y>]; Brendan G. Carr et al., *Unintentional Firearm Death Across the Urban-Rural Landscape in the United States*, 73 J. TRAUMA & ACUTE CARE SURGERY 1006, 1006–10 (2012).

<sup>25</sup> Eric Allen Been, *Why Carrying a Gun Is An Immoral Act, According to Marilynne Robinson*, VOX (Mar. 5 2018), <https://www.vox.com/conversations/2018/3/5/17072260/marilynne-robinson-florida-parkland-shooting-guns> [<https://perma.cc/YF8H-A5FG>] (quoting Marilynne Robinson).

<sup>26</sup> See 18 U.S.C. § 922(g).

<sup>27</sup> See David B. Kopel, *Pacifist-Aggressives vs. The Second Amendment: An Analysis of Modern Philosophies of Compulsory Non-Violence*, 3 CHARLESTON L. REV. 1,



within the larger faiths, teach some variation of personal and political pacifism.<sup>28</sup> Within Christianity, the Amish,<sup>29</sup> Anabaptists,<sup>30</sup> Christadelphians,<sup>31</sup> Hutterites,<sup>32</sup> Jehovah's Witnesses,<sup>33</sup> Moravians (originally),<sup>34</sup> Mennonites,<sup>35</sup> Molokans,<sup>36</sup> Quakers,<sup>37</sup> various Brethren denominations,<sup>38</sup> certain Pentecostal groups,<sup>39</sup> Adventists,<sup>40</sup> some Catholic orders<sup>41</sup> and other religious

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7 (2008) ("Thus, it seems clear that religiously motivated pacifism plays a significant role in supporting anti-gun movements in the United States and elsewhere.").

<sup>28</sup> See generally PETER BROCK, *PACIFISM IN THE UNITED STATES: FROM THE COLONIAL ERA TO THE FIRST WORLD WAR* (1968).

<sup>29</sup> See *id.* at 792–96 (discussing Amish pacifism in the Civil War era); see also *Slabaugh v. United States*, 474 F.2d 592 (6th Cir. 1973) (discussing an Amish conscientious objector case).

<sup>30</sup> See BROCK, *supra* note 28, at 596–97.

<sup>31</sup> See *id.* at 861–66 (discussing history of Christadelphian pacifism, and how it differed in subtle ways from other sects' pacifism); Brent D. Thomas, Comment, *The Impact of the Gulf War on Conscientious Objectors*, 61 UMKC L. REV. 67, 73 n.61 (1992); Timothy G. Todd, *Religious and Conscientious Objection*, 21 STAN. L. REV. 1734, 1734 n.4. (1969).

<sup>32</sup> See *Big Sky Colony, Inc. v. Mont. Dept. of Labor & Indus.*, 291 P.3d 1231, 1234 (Mont. 2012) (discussing history of Hutterite movement, including its pacifist roots, and its community in Montana); *Decker ex rel. Decker v. Tschetter Hutterian Brethren, Inc.*, 594 N.W.2d 357, 361 n.8 (S.D. 1999) ("Hutterites are pacifists."); BROCK, *supra* note 28, at 891–93 (discussing Hutterite pacifism in the United States before the Civil War); Jennifer Carr, *Complicity and Collection: Religious Freedom and Tax*, 11 U. ST. THOMAS L.J. 183, 196 (2014) (discussing Hutterite nonviolence).

<sup>33</sup> See *United States v. Hartman*, 209 F.2d 366 (2d Cir. 1954) (Jehovah's Witness conscientious objector case). For the organization's official doctrinal position, see *Why Don't Jehovah's Witnesses Go to War?*, JW.ORG, <https://www.jw.org/en/jehovahs-witnesses/faq/why-dont-you-go-to-war/> [<https://perma.cc/8DZJ-CWXW>].

<sup>34</sup> See BROCK, *supra* note 28, at 285–321 (discussing Moravian pacifism during the Colonial and Revolutionary eras); *id.* at 321–29 (discussing Moravian pacifism during the nineteenth century).

<sup>35</sup> See *id.* at 159–68 (discussing Mennonite pacifism in the Colonial era); *id.* at 889–905 (discussing Mennonite pacifism, and the pacifism of offshoot groups after the Civil War).

<sup>36</sup> See, e.g., *Dobrenen v. United States*, 235 F.2d 273 (9th Cir. 1956) (Molokan conscientious objector case); *Klubnikin v. United States*, 227 F.2d 87 (9th Cir. 1955) (same); *Chernekoff v. United States*, 219 F.2d 721 (9th Cir. 1955) (same); *Kalpakoff v. United States*, 217 F.2d 748 (9th Cir. 1954) (same); see also William Haas Moore, *Prisoners in the Promised Land: The Molokans in World War I*, 14 J. ARIZ. HIST. 281 (1973) (describing the plight of Molokan conscientious objectors in Arizona during the First World War draft).

<sup>37</sup> See BROCK, *supra* note 28, at 21–158 (describing the Quaker pacifist movement in the early American Colonies); *id.* at 333–88 (describing Quaker pacifism between the War of Independence and the American Civil War); see also *District of Columbia v. Heller*, 554 U.S. 570, 589–90 (2008).

<sup>38</sup> See *Hanauer v. Elkins*, 141 A.2d 903 (Md. 1958) (conscientious objector case); *Ware v. Valley Stream High Sch. Dist.*, 550 N.E.2d 420, 424 (N.Y. 1989) (noting that Plymouth Brethren had official conscientious objector status with the Selective Service System).

<sup>39</sup> See *Ilchuk v. Attorney Gen.*, 434 F.3d 618, 620–21 (3d Cir. 2006) (Pentecostal applicant for asylum fled Ukraine to avoid mandatory military service there); *Movsisian v. Ashcroft*, 395 F.3d 1095, 1096 (9th Cir. 2005) (Pentecostal asylum applicant fled Armenia to avoid mandatory military service there); Michael F. Noone, Jr., *Rendering Unto Caesar: Legal Responses to Religious Nonconformity in the Armed Forces*, 18 ST. MARY'S L.J. 1233, 1283–84 (1987) (describing the case of Pentecostal conscientious objector in 1967).

<sup>40</sup> See BROCK, *supra* note 28, at 843–60 (discussing the history of Adventist pacifism leading up to the Civil War); *United States v. Newton*, 435 F.2d 671 (9th Cir. 1970) (Adventist conscientious objector case).

<sup>41</sup> For example, the Franciscan Third Order renounces the use of weapons. See *Third Order of Francis*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Third\\_Order\\_of\\_Saint\\_](https://en.wikipedia.org/wiki/Third_Order_of_Saint_)

societies have valued pacifism or nonviolence as an important part of their heritage. Many of these groups contend that for three hundred years before Constantine, early Christianity taught adherents that they should not carry weapons or participate in war.<sup>42</sup> Similarly, Bahai,<sup>43</sup> Jainism,<sup>44</sup> some Hindus and Buddhists,<sup>45</sup> and some Sufi orders<sup>46</sup> teach nonviolence. Apart from religion, many secular individuals have philosophical reasons to reject violence. Like religion, philosophical views come in many variations, but there are many people who would *choose* never to have a gun because of their personal convictions and sense of identity. Even those who believe that *some* wars, violence, and use of force by the state are morally justifiable under specific extenuating circumstances may view individual ownership and use of guns for self-defense as a special problem or source of evil. The following sections will explain the practical aspects of the proposal itself, and how it differs from a gun owner registry.

#### A. *Implementation of the Proposal*

Under this proposal, individuals who do not own guns due to their convictions could submit an online registration form, accompanying affidavit or declaration, and supporting identification, with a government agency. For the sake of illustration, suppose the agency would be either the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)<sup>47</sup> or Federal

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Francis [<https://perma.cc/Z2J9-PB4G>] (“Because of the prohibition of bearing arms, the followers of this rule came into conflict with local authorities, which customarily required men to carry arms for service in militias.”).

<sup>42</sup> For an excellent documentary history of early Christian pacifism and nonviolence, see *THE EARLY CHURCH ON KILLING* (Ronald J. Sider ed., 2012).

<sup>43</sup> See Adam E. Frey, *Serving Two Masters: A Scheme for Analyzing Religious Accommodation Requests in the Military*, 74 A.F. L. REV. 47, 78 n.182 (2015) (“For example, Jainism, the Baha’i faith, and certain Christian denominations tend to be pacifist.”); see also *United States v. Hanson*, 460 F.2d 337, 338–39 (8th Cir. 1972) (Bahai conscientious objector case).

<sup>44</sup> See Frey, *supra* note 43.

<sup>45</sup> See Kuk Cho, *Conscientious Objection to Military Service in Korea: The Rocky Path from Being an Unpatriotic Crime to a Human Right*, 9 OR. REV. INT’L L. 187, 192–97 (2007) (discussing Buddhist conscientious objectors and pacifists); Frey, *supra* note 43, at 78–81; see also *Hager v. Sec’y of Air Force*, 938 F.2d 1449, 1451–52 (1st Cir. 1991) (conscientious objector case based on Hindu Ahimsa and Buddhist teachings).

<sup>46</sup> See M. Cherif Bassiouni, *Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime-Change Political Violence*, 8 CHI. J. INT’L L. 119, 136 (2007) (describing “the ascetic spiritual Sufi movement which was essentially pacifist”); Mohamed Abdel Dayem & Fatima Ayub, *In the Path of Allah: Evolving Interpretations of Jihad and Its Modern Challenges*, 7 UCLA J. ISLAMIC & NEAR E.L. 67, 90 n.88 (2008) (describing the advent of Sufi pacifism).

<sup>47</sup> BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, [www.atf.gov](http://www.atf.gov) [<https://perma.cc/6LV6-58DY>].

Bureau of Investigation (FBI),<sup>48</sup> or one of the lesser-known components of the Department of Justice (DOJ), such as the Office of Community Oriented Policing Services.<sup>49</sup> The form would declare that the filer owns no firearms, does not live in a residence where others keep firearms (though this provision is not entirely necessary if it proves too problematic), does not carry an employer-issued firearm at the workplace, and will not acquire or use a firearm for a period of five or more years, though the proposal does not depend on a specific number of years. Registrants would legally surrender or forfeit any previously held permits, registration, or licenses from any state or municipality for concealed carry, open carry, hunting, selling, or ownership of firearms. Submitting a false application or affidavit would carry the same penalties as submitting other false forms or affidavits to the federal government—up to five years imprisonment.<sup>50</sup> Under existing statutes, without any new legislation, possessing a firearm at the time of registration would constitute a felony of making false statements under 18 U.S.C. § 1001, as would registering with the intent of acquiring firearms thereafter, i.e., fraudulently promising not to own guns.<sup>51</sup> The responsible agency would issue a certification card to the individual. The most basic and essential components of this proposal are self-registration (a legal declaration), and official certification. Dispossession would be irrevocable for five years, or whatever period the enacting law stipulates, though obviously anyone could petition a court to find the declaration and certification void due to coercion, duress, or incapacity at the time it was made.

The registering agency would electronically submit the names of these volunteering individuals into the NICS Index, one of the three databases included in the National Instant Background Check System.<sup>52</sup> Self-inclusion in the NICS Index, an idea already proposed by other authors for purposes of suicide prevention,<sup>53</sup> effectively bars the individual from purchasing a firearm from a licensed gun dealer. In states with universal background checks, these individuals will be barred from

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<sup>48</sup> FED. BUREAU OF INVESTIGATION, [www.fbi.gov](http://www.fbi.gov) [<https://perma.cc/YD9U-KRUW>].

<sup>49</sup> See COMMUNITY ORIENTED POLICING SERVICES, <https://cops.usdoj.gov/> [<https://perma.cc/UNL8-7FND>].

<sup>50</sup> See 18 U.S.C. § 1001. Any version of my proposal that still effectuates government registration and certification could trigger charges of “mak[ing] a[] materially false, fictitious, or fraudulent statement” under this statute. *Id.*

<sup>51</sup> See *United States v. Shah*, 44 F.3d 285, 293 (5th Cir. 1995) (applying Section 1001 to false promises to the government).

<sup>52</sup> See *National Instant Criminal Background Check System (NICS)*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/services/cjis/nics> [<https://perma.cc/3C7V-ZFC7>] [hereinafter *NICS*].

<sup>53</sup> See sources cited *supra* note 4.

purchasing guns from most private sellers as well. This makes the certification more meaningful for third parties going forward, especially licensed gun dealers and private unlicensed sellers of firearms, because they could rely on the certification to mean that the person was on the do-not-sell list.

An additional component, completely optional for the proposal overall, would be a single-sentence statutory provision that would designate the “certified gunless” individuals as “prohibited persons” under 18 U.S.C. § 922(g),<sup>54</sup> though this designation would subject individuals only to fines for possession, not imprisonment or a felony conviction. This component would intensify the seriousness of certification and would work to prevent a registrant from changing their mind and trying to buy or borrow a gun from a private unlicensed seller in their state, as most states do not require private sellers to do background checks on prospective purchasers.<sup>55</sup> On the other hand, if Congress passes a universal background check requirement, this component would be unnecessary.

The Vars proposal seeks to protect the self-registrants’ privacy,<sup>56</sup> which makes perfect sense given the unfortunate social stigma associated with those who suffer from mental illness and suicidal thoughts. In contrast, those who are gunless as a matter of strong personal conviction will often prefer instead to publicize their certification, which is why issuance of an official certificate is an essential feature. The government would not have to disclose or publicize the names of those with a gunless certification, though that would be welcome by many of us; even without government disclosure, we could broadcast our certification on social media and show our certification cards to others whenever we choose.

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<sup>54</sup> From a legislative standpoint, the one-line statutory provision could either be an amendment to section 922(g) itself or could simply incorporate it by reference in the enacting statute the self-registration and certification program. *See* 18 U.S.C. § 922(g).

<sup>55</sup> According to the updated survey of state requirements on the Giffords Law Center site, at least twenty-two states and Washington DC now require a background check to at least some private sales, but the other states, such as Texas and Florida, do not. *See Universal Background Checks*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/universal-background-checks/> [https://perma.cc/W9UW-XSJC]. Of these minority states that require background checks for private sales, thirteen (California, Colorado, Connecticut, Delaware, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia) impose a background check requirement at the point of sale for all sales and transfers of all classes of firearms, while a few others require them only for certain guns, or require a background check for a purchase permit but not at the point of sale. *See id.*; *see also* WILLIAM J. KROUSE, CONG. RESEARCH. SERV., R45970, GUN CONTROL: NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS AND RELATED LEGISLATION 1 (2019).

<sup>56</sup> *See Ayres & Vars, supra* note 4, at 939 n.72.

This registration—going gunless—would be completely voluntary. It would constitute an informed, consensual waiver of the person’s right to bear arms. It would not infringe on anyone else’s Second Amendment rights. Joseph Blocher has argued convincingly that the Second Amendment includes a right *not* to have guns, that is, to exclude firearms from one’s property or business if one believes that this is necessary for self-defense.<sup>57</sup> The idea presented here goes beyond concerns for my personal safety. I am arguing that gun ownership is a vice, a vice that contributes to social decay and the overall prevalence of violence, and I think there are millions of Americans who agree. If such a Second Amendment is indeed a two-way right, like the First Amendment against compelled speech, association, or religious expression,<sup>58</sup> that would certainly support the proposal here; nonetheless, the proposal here is merely a statutory initiative, and is at least permissible under the Second Amendment.<sup>59</sup>

### B. *Rationale for the Proposal*

There may be a number of ways to achieve any given policy initiative—new statutes versus amendments to existing statutes, regulations versus statutory enactments, and private sector alternatives in place of government action. This section will address the particular means proposed in this article.

#### 1. Why Amend Existing Statutes Rather Than Create a New Statute?

Rather than propose a model statute, I attempt to propose single-sentence amendments to existing U.S. Code sections, and as few of those as possible. One objective here is legislative minimalism—to design the proposal to require the least amount of legislation possible.<sup>60</sup> This is partly because any full-length statute related to firearms is susceptible to partisan

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<sup>57</sup> See Blocher, *The Right Not to Keep or Bear Arms*, *supra* note 2, at 4.

<sup>58</sup> See *id.* at 18–24.

<sup>59</sup> As an illustration of the difference between safety concerns and moral or religious approbation, Joseph Blocher and Darrell Miller provide an example in their book of an organization of pacifists who own a restaurant or furniture store who would not want patrons to bring guns on their property, not because of safety concerns, but due to their identity as pacifists. JOSEPH BLOCHER & DARRELL A. H. MILLER, *THE POSITIVE SECOND AMENDMENT: RULES, REGULATION, AND THE FUTURE OF HELLER* 162 (2018) (“Even if having or allowing the gun made the person or society safer, the autonomy rationale would say that the individual choice should be respected.”).

<sup>60</sup> See John P. Hennigan, Jr., *Toward Regularizing the Bankruptcy Appealability Statutes*, 6 J. BANKR. L. & PRAC. 365, 368 (1997) (taking a similar approach to proposals for bankruptcy reform).

gridlock, even if the proposed law does not directly interfere with the rights of gun owners.

Legislative minimalism also serves another purpose. There is a virtue in seeking as little disruption to the existing legal framework as possible. Minimal or incremental changes result in less uncertainty about how courts or agencies will interpret ambiguous wording, and create less risk of unforeseen constitutional challenges.<sup>61</sup>

## 2. Government Versus Private?

Could the private sector operate a gunless certification program without state action? The temperance movement relied entirely on teetotaler pledges administered and enforced by local chapters of the movement, at least for its first century or so—there was no government certification necessary, and the pledge movement was wildly successful, as far as social movements go.<sup>62</sup> In theory, a similar private-sector program could work today, especially if some private grant foundations funded the proliferation of local chapters, recruitment efforts, and a reliable verification system for gunless certification.

On the other hand, society has changed dramatically since the days of the temperance movement, when most Americans lived in small towns and villages and everyone was aware of what everyone else was doing. In small, intimate communities, adherence to one's vow, or lapses (a drunken binge) would be known to many neighbors, relatives, and acquaintances. It must have been easier to monitor and enforce social norms in premodern America, for better or worse. Some government participation, such as the low-cost self-registration with NICS and issuance of an official certificate, could be necessary, given the anonymity and information costs in modern society. In addition, presenting the idea first as a system of government registration and certification helps work out the details of such a proposal, and therefore may in fact spur the development of a workable, nongovernmental alternative that accomplishes the same goals. Finally, some government action seems more appropriate than private action given the government's historical role in providing external patronage to the pro-gun movement.<sup>63</sup>

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<sup>61</sup> See *id.* at 367 (“[A]voiding unnecessary special legislation saves the costs of enacting and interpreting it.”).

<sup>62</sup> See GOSS, *supra* note 6, at 62–65 (describing the history and reasons for success of the Prohibition Movement).

<sup>63</sup> See *id.* at 74–76 (describing the history and impact of government support for the gun industry and the National Rifle Association). For a historical account of how government

### C. *The Nomenclature*

The highly variable personal convictions and religious philosophies that drive individuals to refuse gun ownership beg the question of what to call this proposed system. For example, personal opposition to guns ranges from advocating for a complete ban, to favoring moderate regulations and background checks, to a mere distaste for guns and gun-related hobbies. Among religious groups with tenets of nonviolence, some would forbid killing animals as well as humans, while others allow hunting and slaughterhouses, but not lethal force against other humans. Still others focus mostly on teaching against militarism and warfare, due to the large-scale casualties and the ambiguous or mixed political motivations that drive nations to war. This problem with nomenclature requires some clarification.

“Pacifism” is now so inextricably associated with antiwar movements<sup>64</sup> that it would be a misnomer in the context of individuals eschewing ownership of a specific type of weapon, like firearms. A person could be a self-described “pacifist” for purposes of opposing wars and military interventions abroad, but still own a gun for hunting or self-defense. Conversely, someone (like this author) could believe that military interventions are sometimes, albeit rarely, justifiable—for example, to stop the Nazi rampage of conquest and end the Holocaust in World War II—but the same person could also believe that there is no reason for a civilian suburbanite in modern America to have a handgun. So, “pacifism” will not work as the moniker for this latter type of person. “Nonviolent” is also not the right word, though strict nonviolence would be a subset of the larger group of those who disavow gun use or ownership. For example, some who disdain guns still believe it is morally permissible to use some physical restraint or limited force to stop an assault in progress, to fend off a felonious home intruder, to block a would-be suicide bomber from entering

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support of the firearms industry contributed to the development of the American industrial sector, see generally LINDSAY SCHAKENBACH REGELE, *MANUFACTURING ADVANTAGE: WAR, THE STATE, AND THE ORIGINS OF AMERICAN INDUSTRY, 1776–1848* (2019).

<sup>64</sup> See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 590 (2008); *Welsh v. United States*, 398 U.S. 333, 336–38 (1970) (philosophical non-religious conscientious objector refused to cooperate with military conscription order); *Bond v. Floyd*, 385 U.S. 116, 121–23 (1966) (pacifist elected to Congress excluded from his seat in the House); see also Hannibal Travis, *Postmodern Censorship of Pacifist Content on Television and the Internet*, 25 NOTRE DAME J.L. ETHICS & PUB. POL’Y 47 (2011) (exploring “censorship of pacifist and antiwar speech”); Recent Developments, *Pacifism Must Be Result of Specific Training to Allow Naturalization*, 56 COLUM. L. REV. 1233, 1233–36 (1956) (discussing immigration case rejecting the pacifism of a candidate for naturalization because he did not belong to a religious sect that taught antiwar ideals); John L. Luvaas, *A Pacifist in the Service*, EXPERIENCE, Fall 2001, at 29 (recounting experience serving as a conscientious objector in the military during WWII).

a crowded public event, or to restrain a person who is out of their mind and out of control.

“Gun-free” is more accurate and is also catchy, but the term already has strong associations with *places* rather than *people*. We have gun-free zones such as schools,<sup>65</sup> parks,<sup>66</sup> and military bases,<sup>67</sup> and we talk of gun-free communities.<sup>68</sup> We need a term to describe a person who does not want to own a gun as a matter of personal conviction. As mentioned in the Introduction, “gunless” has appeared in a few case decisions<sup>69</sup> and seems more descriptive, so for now, it seems to be the best option.

## II. THE PROPOSAL: MECHANICS

Beginning with a discussion of the registration process and concluding with a description of individuals who may not register as gunless, this Part will discuss the details of my proposal.

### A. *Registration and Certification*

This proposal is for a federal registration and certification program, though it could also work on the state level.<sup>70</sup>

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<sup>65</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549, 551–52 (1995) (striking down the Gun-Free School Zones Act of 1990); *Gallinger v. Becerra*, 898 F.3d 1012, 1014–15 (9th Cir. 2018) (upholding constitutionality of California’s amended Gun-Free School Zone Act).

<sup>66</sup> See, e.g., *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 661–62 (Del. 2017) (ban on guns in state parks and forests unconstitutional); *People v. Chairez*, 104 N.E.3d 1158, 1178–79 (Ill. 2018) (ban on guns within one thousand feet of public park unconstitutional).

<sup>67</sup> See Katie Rose Guest Pryal, *Heller’s Scapegoats*, 93 N.C. L. REV. 1439, 1459 n.85 (2015); Ryan Kearney, *Right-Wingers Are Blaming Bill Clinton for the Navy Yard Shooting*, NEW REPUBLIC (Sept. 17, 2013), <https://newrepublic.com/article/114748/navy-yard-shooting-clinton-blamed-bush-era-military-gun-order> [<https://perma.cc/PP5J-4CMJ>] (tracing the origin of the gun ban on military bases to Donald Atwood’s Department of Defense Directive 5210.56, issued on February 25, 1992).

<sup>68</sup> See Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 319 (2016) (using the term for neighborhoods); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 122 n.47 (1987) (mentioning gun-free communities).

<sup>69</sup> See sources cited *supra* note 3; see also Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, NAT’L INST. JUSTICE RES. BRIEF, May 1997, at 1–3 (using the term for nonowners of guns). Pro-gun advocates sometimes use the word “hoplophobe” pejoratively to describe those pushing for more regulation of firearms. See *Mance v. Sessions*, 896 F.3d 390, 405 (5th Cir. 2018) (Ho, J., dissenting) (“Constitutional rights must not give way to hoplophobia.”); Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53, 56 (2002) (quoting a newspaper letter to the editor piece using the word “hoplophobe”); Philip Weiss, *A Hoplophobe Among the Gunnies*, NY TIMES (Sept. 11, 1994), <https://www.nytimes.com/1994/09/11/magazine/a-hoplophobe-among-the-gunnies.html> [<https://perma.cc/GZA3-B6HH>].

<sup>70</sup> A government agency would have to undertake this program, which from an administrative law standpoint would probably require a legislative enactment (an enabling statute or amended enabling statute). However, some agencies could proceed with the



Government-issued permits, licenses, certificates, and registrations are pervasive in our modern regulatory state. Governments certify teachers and lawyers, they license drivers, physicians, therapists, and barbers, and they register sex offenders, businesses, and political campaigns. All states have some way to issue permits for carrying a concealed weapon, except for the fifteen “constitutional carry” states.<sup>71</sup>

For the sake of discussion, let us assume hypothetically that the ATF, FBI, or the DOJ’s Office of Community Oriented Policing Services creates this program with Congressional authorization.<sup>72</sup> The self-registration could be entirely online, as long as there were sufficient safeguards against registering someone else, such as requiring multiple confidential identifiers (i.e., social security, driver’s license, or passport number). A registrant may include a short, formulaic affidavit or legal declaration to accompany the form as an attachment, as individuals do when filing their income tax returns.

The application and declaration will certify the following: (1) that the registrant does not own any firearms, does not hold or store others’ firearms, and does not dwell with anyone who possesses a firearm, and; (2) that the registrant will not obtain, store, or use a firearm during the next five years.<sup>73</sup> The application and attached affidavit would be subject to the existing federal penal statute regarding submission of false statements to a federal agency,<sup>74</sup> violation of which can result in fines or imprisonment of up to five years.<sup>75</sup> The voluntary legal ineligibility would be a forfeiture of all state permits and licenses for buying, owning, carrying, or hunting with firearms. The responsible agency would then issue an official certification letter and wallet-size card

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program via agency-promulgated directives, procedures, and regulations, as many enabling statutes are open-ended enough to allow agencies the latitude to create a program.

<sup>71</sup> At the time of this writing, Alaska, Arizona, Arkansas, Idaho, Kansas, Maine, Mississippi, Missouri, Montana, New Hampshire, North Dakota, Vermont, West Virginia, and Wyoming, though several states have pending bills to adopt such a law. See *Constitutional Carry*, GUNLAWS.COM, <https://www.gunlaws.com/ConstitutionalCarryIndex.htm> [<https://perma.cc/CTR8-K23U>].

<sup>72</sup> This does not have to always be a federal agency program; individual states could also implement their own system via the state police or other state law enforcement agency.

<sup>73</sup> In anticipation of the objection that some situations may arise in which a person can show that they registered under duress, coercion, incompetency, or some other circumstance that would render the irrevocability of the registration inequitable, I presume that a court could adjudicate the case accordingly and order that the registration is null and void.

<sup>74</sup> See 18 U.S.C. § 1001. Producing a counterfeit certificate would trigger criminal liability under 18 U.S.C. § 1028 (fraud and related activity in connection with identification documents, authentication features, and information); 18 U.S.C. § 1038, which criminalizes conveyance of false information and hoaxes, might also apply and also imposes fines or a five-year prison sentence.

<sup>75</sup> See 18 U.S.C. § 1001(a)(3).

certifying that the individual is legally not a gun owner. If the individual owns guns, they would immediately have to dispossess themselves by selling, gifting, or surrendering the firearms.

Next, the certifying agency would submit the names of registrants to the NICS,<sup>76</sup> meaning registrants would be unable to pass a background check to buy a gun from a licensed dealer. Issuance of a certificate card, however, *is* necessary for the proposal—some government entity would have to issue a card, like a Social Security card or a state driver's license, identifying the registrant as officially, legally gunless. An official letter or page-sized certificate would also work, but is less desirable—for reasons explained below, the registrant will need to be able to display her certification easily to insurance agents, health care providers, law enforcement, retailers, and security guards. Submission of names to the NICS Index should be low-cost and automatically computer-generated; agencies can submit to the NICS Index either through a direct telecommunication line between the FBI and a Criminal Justice Information Services Systems Agency or through the Law Enforcement Enterprise Portal.<sup>77</sup>

If for some reason the certifying agency cannot or will not submit the registrants to the NICS Index, it should be possible for individuals to do it themselves. NICS already has a program, the Voluntary Appeal File (VAF), whereby individuals subject to mistaken denials—say, because they share the same name as a convicted felon—can apply for a verification program to avoid mistaken denials in the future.<sup>78</sup> This is relatively rare—a comprehensive audit by the Office of the Inspector General (OIG) in 2016 found that NICS background denials were 99.8 percent accurate.<sup>79</sup> Yet there are over two million NICS background checks per month,<sup>80</sup> which means around four thousand errors per month, though the OIG audit determined that these were mostly wrongful approvals, rather than mistaken denials.<sup>81</sup> The VAF

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<sup>76</sup> See *NICS*, *supra* note 52.

<sup>77</sup> See *id.*; LAW ENFORCEMENT ENTERPRISE PORTAL (LEEP), <https://www.fbi.gov/services/cjis/leep> [<https://perma.cc/W243-NHUY>].

<sup>78</sup> See 28 C.F.R. § 25.10 (correction of erroneous system information); *Appeals and Voluntary Appeal File (VAF)*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/services/cjis/nics/national-instant-criminal-background-check-system-nics-appeals-vaf> [<https://perma.cc/DAY7-LHQM>] [hereinafter *VAF Brochure*].

<sup>79</sup> See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT OF THE HANDLING OF FIREARMS PURCHASE DENIALS THROUGH THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM ii (2016), <https://oig.justice.gov/reports/2016/a1632.pdf> [<https://perma.cc/UDG6-YVXJ>] [hereinafter *OIG AUDIT*].

<sup>80</sup> For an up-to-date, month-by-month/year-to-year table of NICS background checks, see *NCIS Firearm Background Checks: Month/Year*, FED. BUREAU INVESTIGATIONS, [https://www.fbi.gov/file-repository/nics\\_firearm\\_checks\\_-\\_month\\_year.pdf/view](https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year.pdf/view) [<https://perma.cc/WL4R-VMG8>].

<sup>81</sup> See *OIG AUDIT*, *supra* note 79, at 19.

resembles, in some ways, the TSA precheck or preclearance programs.<sup>82</sup> An individual submits certain documentation to the NICS Section, and once verified, the name appears with others in a list of those who have been prescreened for purchasing a gun.<sup>83</sup> They still have to submit a completed background check form for firearm purchases, a Form 4473, with subsequent purchases from federal firearm licensees (licensed dealers), but the NICS background check identifies the name as being on the list of precleared individuals, so the permission will issue immediately. If NICS already has a list or database of voluntary self-registrants for lawful gun purchasers, it is certainly feasible to have the same arrangement whereby people can voluntarily register to be ineligible. Registration means a registry—an electronic database of all the gunless registrants—that would be easily accessible to federal, state, and local government officials, especially law enforcement. The registry would be unavailable to the public. If registrants want to identify themselves publicly, they can do so with their certification card.

There remains the problem of aftermarket sales and possession.<sup>84</sup> Experts estimate that the number of used guns that change hands in private person-to-person transfers each year is about a fifth of the number of retail sales of new guns.<sup>85</sup> Currently, the U.S. House of Representatives has already passed a bipartisan bill for universal background checks,<sup>86</sup> but its future in the Senate is still uncertain. Universal background checks would require a NICS query, or an equivalent substitute, for private sales of firearms—a gun owner selling a rifle from her own collection to an acquaintance or online buyer, for

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<sup>82</sup> See generally *VAF Brochure*, *supra* note 78.

<sup>83</sup> See *id.*

<sup>84</sup> This issue presents a major difference between my proposal and the Vars-ABA suicide prevention proposals: the latter explicitly exempt registrants from any penalization for possession, and instead merely restrict purchases. See A.B.A., *Resolution 19M106B*, *supra* note 23 (“Registrants who are later found to be in possession of a firearm would not be subject to criminal prosecution . . . . Limiting easy access to firearms is the goal, not punishing individuals who, perhaps in a suicidal crisis, manage to get their hands on guns from other sources.”).

<sup>85</sup> See KROUSE, *supra* note 55, at 9; Kate Masters & Lois Beckett, *Fewer Americans Are Acquiring Guns Without a Background Check, Survey Finds*, TRACE (Jan. 3, 2017, 9:06 AM), <https://www.thetrace.org/2017/01/gun-background-check-private-sale-loophole/> [<https://perma.cc/N55E-4KG7>] (discussing new research that suggests only 26 percent of purchasers now do so without a background check). Older sources suggested higher percentages. See Philip J. Cook et al., *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 70 (1995) (“Based on an estimate of the fraction of guns in private hands that were acquired used, we can extrapolate, under certain assumptions, an estimate of the number of used guns that change hands each year. Given the fifty-fifty split in acquisitions, our best estimate is that there are roughly as many transactions of used guns as there are sales of new guns.”).

<sup>86</sup> Bipartisan Background Checks Act of 2019, H.R. 8, 116th Cong. (2019).

example—and someone registered under this proposal would not pass the background check. If the bill does not pass the Senate, the status quo is that most states do not require background checks for private sales in which no licensed dealer is involved. In that case, even an individual who has a gunless certification could buy a gun from an acquaintance or from a private seller online, or from a nondealer's booth at a gun show.<sup>87</sup> Similarly, even if a person obtained gunless certification and could not purchase any firearms, they might still come into possession of guns through gifts, borrowing, cohabiting with someone who keeps a private arsenal, or storing guns for others.<sup>88</sup> Ten percent or more of the private transfers of used guns are gratuitous,<sup>89</sup> and half of violent youth offenders receive their guns by gifts and finds.<sup>90</sup> Gift transfers of guns between relatives would be exempt even from the expanded background check bill that passed the House and is currently pending in the Senate.<sup>91</sup> These scenarios would violate the pledge the person made when they registered and obtained certification. If the person did not intend to do this at the time of registration, but changed their minds later and received some guns, Section 1001, which penalizes intentionally false statements on federal forms, would not apply.

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<sup>87</sup> Vars discusses this problem in his proposal for self-registration to prevent suicides, and he offers a plausible answer: private sales take more time to arrange, or for delivery, than a walk-in purchase at the nearest sporting goods store or gun shop. See Vars, *Self-Defense Against Gun Suicide*, *supra* note 4, at 1498. I think he is correct regarding impulsive, self-destructive purchases, but the delays involved in private sales are less reassuring for the proposal set forth here.

<sup>88</sup> See Philip J. Cook & Harold A. Pollack, *Reducing Access to Guns by Violent Offenders*, 3 RUSSELL SAGE FOUND. J. SOC. SCI., 2, 4 (2017) (discussing surveys of prisoners that indicate that obtaining guns through loans, gifts, sharing, and thefts are common.); James B. Jacobs & Zoe A. Fuhr, *Universal Background Checking—New York's SAFE Act*, 79 ALB. L. REV. 1327, 1339 (2016) (mentioning the option of obtaining guns as a gift, loan, or sale); Philip J. Cook et al., *Some Sources of Crime Guns in Chicago: Dirty Dealers, Straw Purchasers, and Traffickers*, 104 J. CRIM. L. & CRIMINOLOGY 717, 730 (2015) (noting that juveniles obtain guns almost entirely from informal sources like theft, gifts, and loans, or they find discards); Philip J. Cook et al., *Sources of Guns to Dangerous People: What We Learn by Asking Them*, 79 PREVENTATIVE MED. 28, 34 (2015) [hereinafter Cook et al., *Sources of Guns*] (discussing gift transfers between gang members).

<sup>89</sup> See Cook et al., *Sources of Guns*, *supra* note 88, at 30 (“About one in six are temporary arrangements involving a gun owned by someone else, and take the form of borrowing, renting, or holding the gun. Perhaps surprisingly, one in ten guns are gifts—but gifting of guns is also quite common in the population at large.”); Cook et al., *supra* note 85, at 69 (citing other surveys to support the 10 percent figure).

<sup>90</sup> See Daniel W. Webster et al., *How Delinquent Youths Acquire Guns: Initial Versus Most Recent Gun Acquisitions*, 79 J. URB. HEALTH 60, 60 (2002) (“About half of the first gun acquisitions were gifts or finds. The first guns youths acquired were usually obtained from friends or family. The most recent acquisitions were often new, high-caliber guns, and they came from acquaintances or drug addicts.”).

<sup>91</sup> See CONGRESSIONAL RESEARCH SERV., IF11121, FIREARM BACKGROUND CHECKS: CURRENT FEDERAL FRAMEWORK AND THE HOUSE-PASSED PROPOSALS IN THE 116TH CONGRESS VERSION 2 (2019).

Enforcing the promise to remain gunless could require no more than a one-line statutory addition. One option, for example, would be a short amendment to 18 U.S.C. § 922(g), which lists the federal “prohibited persons” for firearm possession.<sup>92</sup> Similarly, a provision in another statute could incorporate § 922(g) by reference, such as a statute explicitly authorizing a certain agency to operate the registration and certification program described here, or an existing statute relating to the delegated powers that the agency already has. An even more modest proposal would be an addition to § 922(x), which currently bans juveniles from buying guns but does not carry the same incarceration penalties as § 922(g).<sup>93</sup> Of course, there could also be a new standalone subsection to § 922.

In any case, it seems appropriate that a person who obtains official certification as gunless but then secretly reneges should be subject to civil fines and uncompensated forfeiture of any firearms or ammunition they acquired in violation of their official pledge. On the other hand, it seems inappropriate to subject the lapsed registrant to any prison time or a criminal conviction. The advantage of incorporating a provision into § 922(g), or incorporating § 922(g) by reference, is the lower legislative transaction cost of a one-line incremental change to a long-standing statutory regime, rather than the creation of entirely new code sections.<sup>94</sup> The serious disadvantage of using § 922 is that it is a penal statute, and the related sentencing guideline sections impose daunting incarceration sanctions.<sup>95</sup> Any amendment provision under my proposal would have to include an explicit variance for punishment—fines but no imprisonment, and no felony conviction. At the same time, violating the gunless certification would usually be undetectable, with the exception of a person who was subject to a law enforcement search for an unrelated reason. For situations such as those, it would be an advantage for the statute to include language that allows the law enforcement agency to have jurisdiction to enforce the individual’s registration and seize the discovered firearms.

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<sup>92</sup> See 18 U.S.C. § 922(g).

<sup>93</sup> See 18 U.S.C. § 922(x).

<sup>94</sup> See Dru Stevenson, *Costs of Codification*, 2014 U. ILL. L. REV. 1129, 1142–50 (2014) (discussing the legislative transaction costs of amending existing code sections versus creating new sections).

<sup>95</sup> U.S. SENTENCING COMM’N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Felon\\_in\\_Possession\\_of\\_a\\_Firearm.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Felon_in_Possession_of_a_Firearm.pdf) [https://perma.cc/X4UF-2F2Q] (“The average sentence length for offenders convicted of violating only section 922(g) but who were not sentenced under ACCA was [forty-six] months.”).

Registration would be a legally binding declaration and commitment, and certified gunless individuals should be subject to fines and firearm forfeiture, without compensation, if they later decided to acquire a firearm in violation of their pledge. In litigation, courts should be free to take judicial notice of the fact that a party or witness is a certified registrant, if it is a relevant fact in the case.<sup>96</sup> In sum, in order for registration to be effectively enforced, amending currently existing statutory language such as § 922 is a strong viable option, since it requires little legislative action and the statute contains a preexisting penal scheme.

### B. *No Registration of Gun Owners*

One advantage of this proposal for voluntary registration of those without firearms is that it helps fill in some of the negative space around the field of gun ownership, which in turn, mitigates these market failure problems and barriers to law enforcement. For instance, the Firearm Owners' Protection Act of 1986<sup>97</sup> prohibits the federal government, or states, from keeping any database or registry linking firearms to their current owners.<sup>98</sup> Nevertheless, a few states require private sellers (licensed dealers that facilitate the private sales) to keep some kind of records of the sales, but usually do not require submission of records to authorities.<sup>99</sup> Two jurisdictions, the District of Columbia<sup>100</sup> and Hawaii,<sup>101</sup> require registration of all firearms; New York requires registration of all handguns,<sup>102</sup> and California has a database of all firearm transfers.<sup>103</sup> Five states require registration of assault weapons and/or 50-calibre

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<sup>96</sup> This is another significant difference with some of the state legislative versions of the Vars-ABA proposal. *See, e.g.*, WASH. REV. CODE § 9.41.350(4) ("Neither a voluntary waiver of firearm rights nor a revocation of a voluntary waiver of firearm rights shall be considered by a court in any legal proceeding.").

<sup>97</sup> Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified at 18 U.S.C. § 921).

<sup>98</sup> *Id.* § 106(4).

<sup>99</sup> *See, e.g.*, CAL. PENAL CODE §§ 11105–06, 28100–28215; COLO. REV. STAT. §§ 18-12-112, -402, -403; CONN. GEN. STAT. §§ 29-31, -33(e), -37a(d), (f)(3); DEL. CODE ANN. tit. 11, § 1448B, tit. 24, §§ 904–904A; 430 ILL. COMP. STAT. 65/3(b); 720 ILL. COMP. STAT. 5/24-4; MD. CODE ANN., PUB. SAFETY §§ 5-101, -120, -145; MD. CODE REGS. 29.03.01.09(D); MICH. COMP. LAWS §§ 28.422(5), .422a(2); N.J. STAT. ANN. §§ 2C:58-2b, -3h; N.Y. GEN. BUS. LAW § 898; N.Y. PENAL LAW §§ 265.00(3), 400.00(12); 18 PA. CONS. STAT. §§ 6111(b)(1), (1.1), (1.4), (c), 6113(a)(5), (d); 37 PA. CODE § 33.111; R.I. GEN. LAWS §§ 11-47-35(a)(2), -35.2(b); D.C. CODE ANN. §§ 7-2504.04(a)(3), (b). Washington requires all firearm transfers to occur via a licensed dealer, so dealer recordkeeping requirements include private sales. *See* WASH. REV. CODE § 9.41.110(1)–(3), (9).

<sup>100</sup> D.C. CODE ANN. §§ 7-2502.01–.10; D.C. CODE MUN. REGS. tit. 24, §§ 2311–20.

<sup>101</sup> HAW. REV. STAT. ANN. §§ 134-3(a), (b), -4(b).

<sup>102</sup> *See* N.Y. PENAL LAW §§ 265.00(22)(e)–(f), 400.00(10), (16-a), 400.02.

<sup>103</sup> *See* CAL. PENAL CODE §§ 11106(a)(1)–(b)(1), 28100, 28160.

rifles.<sup>104</sup> In addition, the National Firearms Act requires the registration of machine guns, silencers, and short-barrel shotguns,<sup>105</sup> and the Gun Control Act of 1968 requires, as many states also require, licensed firearms dealers to keep records of all sales, and to provide records when federal law enforcement agencies request them,<sup>106</sup> as do many states.<sup>107</sup>

The NICS program can report how many background checks occur every year, and the firearm manufacturing industry certainly knows their annual sales volume; but these merely suggest numbers of purchases in a given period, without indicating who buys or ends up possessing the guns. The absence of information about who owns guns potentially creates market failures in the insurance and risk-management industries. By clearly identifying individuals who are gunless, this proposal would make more information available to the insurance and risk-management industries, which in turn will be able to perform more effectively.

### III. THE PROPOSAL: BENEFITS

The foregoing sections sketched out the details of the proposal for voluntary registration and certification of those eschewing firearms. This proposal would be a simple, yet effective, way to move the gunless narrative forward. It would also come with many benefits, including self-expression, social identification, and the formalization of an important civic action and personal moral commitment. Further, it could prove to be a useful tool for market signaling, that is, providing information that would elicit free market responses from commercial entities and social institutions.

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<sup>104</sup> See CAL. PENAL CODE § 30900; CONN. GEN. STAT. § 53-202d(a); MD. CODE ANN., CRIM. LAW § 4-303; N.J. STAT. ANN. §§ 2C:39-5(3)(f), :58-12(b); N.Y. PENAL LAW §§ 265.00(22)(e)–(f).

<sup>105</sup> 26 U.S.C. § 5845(a). The National Firearm Act also includes, in a category defined as “any other weapon,” certain smooth-bore handguns, but no other handguns. 26 U.S.C. § 5845(e).

<sup>106</sup> 18 U.S.C. § 923(g)(1)(A); *see also* 27 C.F.R. § 478.129 (stating that such records must be maintained for at least twenty years).

<sup>107</sup> See, e.g., CAL. PENAL CODE § 28100; MICH. COMP. LAWS §§ 28.422(5), .422a(2); N.Y. GEN. BUS. LAW § 898; N.Y. PENAL LAW § 400.00(12); N.C. GEN. STAT. § 14-406; OR. REV. STAT. § 166.412(2); 18 PA. CONS. STAT. §§ 6111(b)–(c), 6113(a)(5), (d); 37 PA. CODE § 33.111.

A. *Social Identification and the Personal Disarmament Movement*

Political and social movements need markers and signals of member identification and member identity to flourish.<sup>108</sup> Naming and framing are essential features of social movements, but a movement's cohesiveness and recruitment also depend on signs and symbols of membership, which are indicia of shared values, goals, and commitment level.<sup>109</sup> This is the "branding" of the movement in a marketing sense, as it creates recognizable distinctions between insiders and outsiders, and between "core members" or radicals and tagalongs or the bandwagon crowd.<sup>110</sup> Some researchers who study social movements refer to two prongs, "identity," and "agency," that are essential to a social movement's success. These elements help groups to translate their passion into action.<sup>111</sup> These indicia can take the form of symbols and slogans—more than mere social media hashtags—as well as badges, cards, and other objects signifying one's choice to join. "Symbols matter because a person's manifested attitude toward symbols tells others something about that person's character. People rely heavily on this information when deciding whether to engage in cooperative behavior in all realms of life."<sup>112</sup>

Movements advocating for a prohibition or restriction, or for a negative action, often build upon a forerunner movement of abstinence, and abstinence movements depend heavily on signifiers of commitment and membership.<sup>113</sup> Anti-alcohol, anti-smoking, and anti-abortion movements have all been successful, even though they involved advocacy for negative action that limited individual choice.<sup>114</sup> Regarding firearms, there is the additional issue of a concrete object that people can possess (the gun itself), which is a highly salient symbol to the owner for creating a perceived sense of status or wealth, membership in a social group,<sup>115</sup> and an endowment effect (over-valued resistance

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<sup>108</sup> See Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 965 (1997) (discussing the importance of uniform signaling in social morality).

<sup>109</sup> See GOSS, *supra* note 6, at 32 ("Collective efficacy comes when disenchanted individuals, first, recognize themselves as a group with a shared grievance and, second, believe that collective action can reduce or eradicate the source of that grievance.").

<sup>110</sup> See *id.* (surveying and synthesizing the literature on this subject).

<sup>111</sup> See, e.g., *id.*

<sup>112</sup> Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 766–67 (1998) [hereinafter Posner, *Symbols, Signals, and Social Norms*].

<sup>113</sup> See *id.* at 790 (describing effective commitment mechanisms by subcultures such as desecrating the flag).

<sup>114</sup> See GOSS, *supra* note 6, at 51–65.

<sup>115</sup> See *People of the Gun: A Tribe of Firearm Owners and Bloggers; Just Ordinary Americans, Many of Them Your Friends and Neighbors*, AMMO.COM, <https://ammo.com/people-of-the-gun> [<https://perma.cc/8QXZ-QYZ3>].



towards those who might want to confiscate the item once it is in possession). It is also a highly salient symbol for others, most significantly, to fellow owners. Their counterparts on the other side of the policy divide have only a negative in that they lack an item that others possess and prize. A certificate that recognizes the person's decision or commitment to renounce gun ownership helps fill this psychological void—the object itself is a salient symbol for the possessor of their membership in a group, provides a perceived sense of status, and, I expect, even an endowment effect; and it is certainly salient for others who have the same certification. As Kristin Goss observes, movement leaders, whom she calls issue entrepreneurs, must find ways to individualize the collective goods or social reforms the group seeks.<sup>116</sup>

Social groups and movements need commitment signifiers to build solidarity. As Posner observed, “[s]olidarity’ denotes the ability of people to cooperate in the absence of legal sanctions.”<sup>117</sup> Social movements and groups cannot survive without mechanisms in place to build and maintain solidarity and to solve coordination problems such as defection or abandonment of the cause, free riding on the efforts of others, and so on.<sup>118</sup> An up-front costly commitment or investment is one example of an effective mechanism.<sup>119</sup> Some social movements and groups, like unions, can create collective goods for the members, so it is in the state's interest to have rules that help build and preserve solidarity in such groups.<sup>120</sup> Suppose the government decides that gun prevalence involves enormous externalities—the hundreds of thousands of guns stolen per year that resupply the illicit firearm traffickers, as well as accidental discharges, bad aim, escalation of violence;<sup>121</sup> simple rules that enable some citizens to desist from gun ownership and encourage others to make a similar commitment would be in the state's interest, and would merely require incremental policy steps.<sup>122</sup>

Regarding the necessary components for successful social movements, consider the early twentieth century

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<sup>116</sup> See GOSS, *supra* note 6, at 108.

<sup>117</sup> Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 135 (1996).

<sup>118</sup> See *id.* at 137–41.

<sup>119</sup> See *id.* at 140.

<sup>120</sup> See *id.* at 193 (“Solidary groups supply collective goods that people otherwise demand from the state. Through policies of selective support, the state can effect increases in the supply of these goods more cheaply than it could supply them itself through direct or category-based regulation.”).

<sup>121</sup> See FIRMIN DEBRABANDER, *DO GUNS MAKE US FREE?: DEMOCRACY AND THE ARMED SOCIETY* 186 (2015).

<sup>122</sup> For a discussion of the incrementalistic approach in advocacy movements, see GOSS, *supra* note 6, at 65–67.

temperance/prohibition movement and the word “teetotaler.”<sup>123</sup> As a movement, it was spectacularly effective,<sup>124</sup> even if the resulting policy experiment failed. A movement to ban something that was, at the time, popular and enjoyable won over enough support to get a two-thirds supermajority in both houses of Congress, in addition to ratification by three-fourths of the state legislatures. This is where the words, the vows, and membership identity come into play. The word “teetotaler” entered the English language around 1830 to refer to those who abstain completely, as a matter of conscience, from alcohol.<sup>125</sup> Of course, there have always been individuals who did not drink alcohol—whether for religious, health, or financial reasons—but there was no single word, title, or label for this. The word “temperance,” for most of its history, meant “moderation” or self-control, not a radical commitment to complete, permanent abstinence.<sup>126</sup> The prevailing theory among linguists and etymologists seems to be that “teetotaler” comes either from an emphatic duplication of the first syllable of “total”—a person who abstained totally from alcohol due to a formal, permanent vow was “totally, totally” committed, hence, “t-totally”<sup>127</sup>—or that the “t” was an abbreviation for “temperate,” so a “t-totaler” was “totally temperate.”<sup>128</sup> A teetotaler, therefore, was stricter, more conscientious, and more committed than someone who incidentally did not drink alcohol, due to temporary scarcity or unavailability of beverages or money to buy them.

The temperance movement, before it became the prohibition movement, was the teetotaler movement, a grassroots movement that organized local chapters in cities, towns, and villages across the states and territories.<sup>129</sup>

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<sup>123</sup> See *id.* at 62–72 (describing the history and reasons for success of the Prohibition Movement).

<sup>124</sup> See *id.* at 62–65 (detailing the framing of issues in the Prohibition Movement); R. Shep Melnick, *The Federal Safeguards of Politics*, 41 WILLAMETTE L. REV. 847, 859 (2005) (describing the political effectiveness of organizing local chapters).

<sup>125</sup> See *Teetotal*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/teetotal> [<https://perma.cc/E2KC-6KEM>].

<sup>126</sup> See Harry G. Levine, *Temperance Cultures: Alcohol as a Problem in Nordic and English-Speaking Cultures*, in *THE NATURE OF ALCOHOL AND DRUG-RELATED PROBLEMS* 9–11 (Malcom Lader et al. eds., 1993).

<sup>127</sup> See GEORGE CRUIKSHANK, *THE GLASS AND THE NEW CRYSTAL PALACE* 4 (1853) (nineteenth century tract-book advocating temperance).

<sup>128</sup> See *Teetotalism*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Teetotalism> [<https://perma.cc/VZ8T-8YN3>] (describing the dispute about the origin of the term); see also *Teetotal*, *supra* note 125.

<sup>129</sup> See Dalton Windham, “*The White Ribbon Army*”: *Politics and Race Relations of the Georgia Woman’s Christian Temperance Union from 1880 to 1907*, 24 J. S. LEGAL HIST. 151, 155–63 (2016) (describing the emergence, local organization, and growth of the temperance movement in Georgia); WILLIAM H. CHILD, *AUTOBIOGRAPHY AND MEMOIRS* 49–50 (CreateSpace

Membership in these chapters required taking a public, solemn oath to abstain forever from alcohol—at the movement’s peak, at least one in ten Americans had signed the pledge.<sup>130</sup> The groups were close-knit and afforded a sense of community, friendship, or intimacy, and they also provided accountability.<sup>131</sup> Violators of the vow were subject to expulsion and shunning.<sup>132</sup> Membership was appealing to outsiders, because the members had a close-knit community organized around a deep commitment to a common cause, an obvious air of moral superiority,<sup>133</sup> and a *name*. Socially, the word “teetotaler” made teetotaling a “thing,” which was the basis of the movement. The vows, which local chapters enforced through social pressure and expulsion, built a grassroots base of deeply and publicly committed members.<sup>134</sup> As Kristin Goss explains, “[w]hat made the movements possible was political entrepreneurs who were able to frame private behavior as a public problem in terms that were consonant with widely shared values and capable of mobilizing well-organized groups.”<sup>135</sup> Decades later, as the temperance movement morphed into the prohibition movement, membership became a litmus test for church members, institutional leadership, and—in the end—for political candidates.<sup>136</sup>

The modern gun rights movement has been highly effective—much more so than the opposing side—in part due to its focus on grassroots, local organization and membership identification.<sup>137</sup> National Rifle Association (NRA) members pay

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Independent Publishing Platform 2015) (1917) (describing the formation of a local chapter of the Sons of Temperance, a quasi-secret society, in Cornish, New Hampshire in 1866).

<sup>130</sup> See Jason Mazzone, *The Creation of a Constitutional Culture*, 40 TULSA L. REV. 671, 681–83 (2005) (describing the signed pledge as an important tool); CHILD, *supra* note 129.

<sup>131</sup> See Mazzone, *supra* note 130; see also Erin M. Masson, *The Woman’s Christian Temperance Union, 1874–1898: Combatting Domestic Violence*, 3 WM. & MARY J. WOMEN & L. 163, 182 (1997) (describing the organization and achievements of the temperance movement and the “circle of intimate acquaintances”).

<sup>132</sup> See Sascha Auerbach, “Beyond the Pale of Mercy”: Victorian Penal Culture, Police Court Missionaries, and the Origins of Probation in England, 33 LAW & HIST. REV. 621, 632–33 (2015) (describing pledge enforcement at the time).

<sup>133</sup> See Bosworth v. Mass. Woman’s Christian Temperance Union, 11 N.E.2d 916, 916–17 (Mass. 1937) (describing a local chapter of the temperance union, which received share of testator’s estate).

<sup>134</sup> See Mazzone, *supra* note 130, at 681; Geoffrey R. Stone, *The Second Great Awakening: A Christian Nation?*, 26 GA. ST. U. L. REV. 1305, 1321–22 (2010) (describing the rapid growth of the temperance unions and the pledge system).

<sup>135</sup> See GOSS, *supra* note 6, at 63.

<sup>136</sup> See generally *id.* at 62–64 (describing the prohibition movement’s origins in the temperance movement and the pathway to political success).

<sup>137</sup> See *id.* at 90 (describing NRA ground game); see also Jennifer Carlson, *Gun Studies and the Politics of Evidence*, 16 ANN. REV. L. & SOC. SCI. 183, 193–95 (2020) (describing the NRA’s framing and benefits offered to its constituents through membership and participation in activities); Stacie J. Osborn, *Preventing Intimate Partner Homicide: A Call for Cooperative Federalism for Common Sense Gun Safety Policies*, 66 LOY. L. REV. 235, 254–55 (2020)

dues, have rallies, support legislative initiatives, and receive training courses on firearm usage.<sup>138</sup> They have clothing accessories emblazoned with logos and slogans, bumper stickers, membership cards, and a state-of-the-art website.<sup>139</sup> There are a variety of shorthand names with which they can identify themselves—"I'm the N-R-A," "2A advocates," and so on.

The other side in this kulturkampf has not fared so well. As explained by Kristin Goss in her insightful book *Disarmed: The Missing Movement for Gun Control in America*, the "gun control" movement never really got off the ground in the 1960s and 1970s, or in the decades thereafter, because it lacked effective grassroots organization, recruitment, or effective framing—the exact opposite of the pro-gun movement during the same period.<sup>140</sup> After the public shock over the school massacres in Newtown and Parkland, the movement has been trying, with some success, to reinvent itself as the more reasonable-sounding "gun safety" movement or as a public health movement.<sup>141</sup> One can sign up for newsletters, donate, and participate in occasional marches or protests; but even the local chapters of "Everytown" do not function like local NRA chapters, and much less like the close-knit, active communities found in the local chapters of the Sons and Daughters of Temperance in a previous era, which had weekly meetings in small groups for accountability, support, and fellowship.<sup>142</sup>

How does one become a member of the anti-gun movement? Enabling Americans to identify themselves as officially gunless would help create social identification markers for the anti-gun movement, something missing up to now; formal signals and labels of identification with a movement are necessary for a movement's

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(describing NRA lobbying and grassroots efforts); David B. Kopel, *The Great Gun Control War of the Twentieth Century—And Its Lessons for Gun Laws Today*, 39 FORDHAM URB. L.J. 1527, 1552–57 (2012) (describing the grassroots development of the NRA); Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 FORDHAM L. REV. 681, 703–08 (2004) (describing the NRA's growth strategy and development).

<sup>138</sup> See *What Is the NRA?*, NAT'L RIFLE ASS'N, <https://membership.nra.org/FAQ> [<https://perma.cc/DT5H-KKMC>].

<sup>139</sup> See NAT'L RIFLE ASS'N, <https://home.nra.org/> [<https://perma.cc/KQD3-49US>].

<sup>140</sup> See Goss, *supra* note 6, at 190–94.

<sup>141</sup> For an updated perspective on the movement, and its growth since the Sandy Hook and Parkland massacres, see Kristin A. Goss, *Whatever Happened to the 'Missing Movement'? Gun Control Politics Over Two Decades of Change*, in GUN STUDIES: INTERDISCIPLINARY APPROACHES TO POLITICS, POLICY, AND PRACTICE 136–49 (Jennifer Carlson et al. eds., 2018).

<sup>142</sup> See *id.*; see also Aimee Huff & Michelle Barnhart, *How a 'Missing' Movement Made Gun Control a Winning Issue*, CONVERSATION (Apr. 10, 2019, 6:49 AM), [theconversation.com/how-a-missing-movement-made-gun-control-a-winning-issue-113301](https://theconversation.com/how-a-missing-movement-made-gun-control-a-winning-issue-113301) [<https://perma.cc/5ZHF-99GW>]; Kristin Goss, *Gun Laws Are Being Reformed, Just Not on Capitol Hill*, CONVERSATION (Dec. 10, 2015, 6:19 AM), [https://theconversation.com/gun-laws-are-being-reformed-just-not-on-capitol-hill-51850?utm\\_medium=email&utm\\_campaign=Latest](https://theconversation.com/gun-laws-are-being-reformed-just-not-on-capitol-hill-51850?utm_medium=email&utm_campaign=Latest) [<https://perma.cc/SY6N-WMZE>].

success.<sup>143</sup> A system that allows individuals to make a legally binding vow of personal disarmament, with certification, could change the course of the movement. Also missing from the gun control movement has been any call for personal abstinence from gun ownership, or a personal pledge or commitment of self-denial in this regard. On the contrary, the modern trend is for spokespersons in the gun control movement to declare their appreciation for responsible, safe, law-abiding gun owners.<sup>144</sup> Some advocates for gun control, in fact, tout their own gun ownership to establish credibility with other gun owners and undecided prospective constituents—such as Gabby Giffords,<sup>145</sup> whose efforts and advocacy organizations have made impressive positive achievements. The Parkland Pledge,<sup>146</sup> created by student activists following a recent school massacre, strangely omits a pledge to abstain from gun ownership. This approach is legitimate and has certainly been effective, but there is also a place—a need—for those who want to change social norms and values about guns, in addition to treating gun ownership as a public health or violence prevention issue. Influencing public morality starts with some individuals treating the issue as a matter of personal morality; the time has come for some advocates to renounce personal gun ownership openly, and to do so for themselves before they ask or encourage others to do the same. Movements need at least some exemplary icons, those who openly manifest a radical personal commitment<sup>147</sup>—those whom Posner calls “norm entrepreneurs,” who initiate the signals of commitment to foster cooperation efforts.<sup>148</sup> A social signal must be costly to be effective at identifying a true believer.<sup>149</sup>

The anti-slavery movement provides another illustration. Two generations before the abolitionist movement gained traction, there was an individualized anti-slavery movement, famously described in the colonial-era journal of John

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<sup>143</sup> See MATTHEW A. PEEPLES, *CONNECTED COMMUNITIES: NETWORKS, IDENTITY, AND SOCIAL CHANGE IN THE ANCIENT CIBOLA WORLD* 27 (2018) (“[C]ategorical identities are usually named social entities, often with specific material markers of membership or participation.”).

<sup>144</sup> See, e.g., IGOR VOLSKY, *GUNS DOWN: HOW TO DEFEAT THE NRA AND BUILD A SAFER FUTURE WITH FEWER GUNS* 141–45 (2019); see also GUN OWNERS FOR RESPONSIBLE OWNERSHIP, <https://www.responsibleownership.org> [<https://perma.cc/2YQQ-MDJ9>].

<sup>145</sup> See Maggie Astor, *Why Gabby Giffords Is Starting a Gun Control Group for Gun Owners*, N.Y. TIMES (Apr. 19, 2019), <https://www.nytimes.com/2019/04/19/us/politics/gabby-giffords-minnesota-guns.html> [<https://perma.cc/5QSS-S4W9>] (“Ms. Giffords and her husband, Mark Kelly, who is running for Senate in Arizona, own guns themselves and argue that gun ownership can coexist with significantly stricter gun laws.”).

<sup>146</sup> See *The Parkland Pledge*, CHANGE.ORG, <https://www.change.org/p/sign-the-parkland-pledge-today> [<https://perma.cc/MQD8-FNZK>].

<sup>147</sup> See Ari Decter-Frain et al., *Why and How Groups Create Moral Heroes*, in *HANDBOOK OF HEROISM AND HEROIC LEADERSHIP* 122–23 (Scott T. Allison et al. eds., 2016).

<sup>148</sup> See Posner, *Symbols, Signals, and Social Norms*, *supra* note 112, at 773.

<sup>149</sup> See *id.* at 768.

Woolman.<sup>150</sup> Woolman was a Quaker who realized that slave ownership was a vice.<sup>151</sup> Over a period of several years, Woolman played a major role in convincing other Quakers in the American colonies to free their slaves.<sup>152</sup> Similarly, the temperance and anti-smoking movements were built on an underlying premise that supporters would personally refrain from indulging in the respective vice—to quit drinking or quit smoking. A demarcated personal commitment of abstinence is necessary to give moral credibility to a reform movement, and to occasion the grassroots recruitment by way of “take the pledge” drives.<sup>153</sup> Pledges of abstinence or oaths of renunciation also alter the balance of each individual’s calculus in advocating for new laws—a person who already thinks of herself as someone who will *never* own a gun will feel no loss when restrictions on gun ownership, sales, or use become law. A system that allows individuals to receive certification for renouncing gun ownership may be essential to galvanize, and build, a different type of anti-gun movement—one that is truly anti-gun, versus a movement that favors various types of moderate regulations. As CNN writer John Blake has noted, “Some have suggested that the NRA will lose power if guns are reframed as something uncool, like cigarettes.”<sup>154</sup>

Legal mechanisms can shift the meaning of certain activities so that social norms change as well.<sup>155</sup> Changing the social meaning of gun ownership could eventually produce a shift in the choices people make and how they view and treat others.<sup>156</sup> Other commentators have used the example of motorcycle helmets: if legal rules, or even legal nudges, were to change the meaning of riding without a helmet from a carefree act of enjoyment into a recklessly risky activity, then social

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<sup>150</sup> See generally JOHN WOOLMAN, *THE JOURNAL OF JOHN WOOLMAN* (first publ. 1774) (republished online by CCEL), <http://www.ccel.org/w/woolman/journal/cache/journal.pdf> [<https://perma.cc/F7WZ-AWVB>].

<sup>151</sup> See *id.* at 8–10.

<sup>152</sup> See *id.* at 14–17; see also BROCK, *supra* note 28, at 52 (“Woolman was one of those most responsible for bringing about the abolition of slaveholding among Friends and for launching the Society on its antislavery career.”).

<sup>153</sup> One of the most successful tools used by the temperance movement required people to sign pledges. See Holland Webb, *Temperance Movements and Prohibition*, 74 INT’L SOC. SCI. REV. 61, 66 (1999) (“Whereas, the use of intoxicating liquors as a beverage is productive of pauperism, degradation and crime; and believing it our duty to discourage that which produces more evil than good, we therefore pledge ourselves to abstain from the use of intoxicating liquors as a beverage.” (internal citation omitted)).

<sup>154</sup> John Blake, *This Is How the NRA Loses*, CNN (Oct. 16, 2015), <https://www.cnn.com/2015/10/15/politics/defy-gun-lobby/index.html> [<https://perma.cc/7YPR-HBUZ>].

<sup>155</sup> See Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 41–42 (2002).

<sup>156</sup> See *id.* at 41 (“Changing social meaning will have an effect on the acts that members of society sanction and may also affect whether a preference for or against the regulated behavior becomes internalized and therefore subject to third order sanctions.”).

norms would disapprove of riding without a helmet.<sup>157</sup> In fact, many individuals often internalize such a change in meaning so that it becomes part of their own value system, and they would feel silly, or even a little guilty, for riding without a helmet.<sup>158</sup> A legal mechanism, therefore, that enabled individuals to declare and certify themselves as gunless can change how the rest of society views and responds to gun ownership and gun abstinence, and could even shift the values people internalize for themselves about the need or the virtue of owning a gun. In other words, it would be easier for individuals to see how gun ownership, even for self-defense, could be a vice.<sup>159</sup>

One anticipated objection to my proposal is that it could indirectly stigmatize gun ownership by legitimizing, and then popularizing, personal disarmament. Yet there is nothing unconstitutional about cultivating social norms and values that indirectly generate collective approbation for firearms. Just as NRA support has long been a litmus test for Republican politicians, a gunless certification could become a badge of honor for progressives or even moderate candidates. During the prohibition movement, the teetotaler designation was a useful screening mechanism for single-issue voters, who in turn were instrumental in achieving unlikely political success. Popular celebrities could lend verve to the movement by registering and flaunting their certification. Gunlessness could become a status symbol in the same way that assault weapons are in pro-gun circles today. Social norms can have more effect on behavior than legal rights. In any case, the certification proposal would create a type of personal “political opportunity,” as scholars of mass movements call it.<sup>160</sup>

The ability to signal deeply held behavioral commitments through official declarations also lowers information costs for legislators, enforcers, and adjudicators.<sup>161</sup> Legislators and

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<sup>157</sup> See *id.*

<sup>158</sup> See *id.*

<sup>159</sup> See McAdams, *An Attitudinal Theory*, *supra* note 7, at 344–49.

<sup>160</sup> See GOSS, *supra* note 6, at 186.

<sup>161</sup> See, e.g., Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 57 (2006) (discussing signaling between voters and laterally between lawmakers); Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1771–72 (2007) (describing a popular theory in political science about the signaling functions of the citizenry to Congress through regulatory agencies); Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 132–34 (2012) (discussing information availability and signaling of preferences by the citizenry); Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 966 (2012) (discussing interbranch preference signaling and imperfect information); Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 538–39 (1998) (discussing signaling between tax beneficiaries and lawmakers); Aziz Z. Huq, *Binding the Executive (By Law or by Politics)*, 79 U. CHI. L. REV. 777, 820–22 (2012) (discussing voter

regulators glean useful information about voter constituents' values, as well as a picture of exceptional subgroups (outliers) within a regulated community.<sup>162</sup> Researchers call this "preference signaling," that is, the idea of "sending reliable information to elected officials about public demands."<sup>163</sup> Analogously, law enforcement officers and prosecutors would have additional information to avoid mistakes with over- and under-enforcement of the rules, or at least to reduce Type I errors in arrests and prosecutions. Adjudicators can streamline certain factual or evidentiary determinations when otherwise contested points are already a matter of public record. Those who believe that their group affiliation or race makes them more vulnerable to wrongful accusations or even wrongful convictions may welcome signaling devices that reduce the likelihood that law enforcement would incorrectly implicate them in a crime.

### B. *Self-Signaling and Identity: Formalizing Our Personal Commitments*

Formalizing our personal moral commitments with ceremonies and oaths is a practice across cultures and serves an important subjective psychological purpose. It strengthens our resolve and becomes part of our sense of self; it turns a choice into part of our identity, our subjective persona.<sup>164</sup> Commitment formalities are uniquely expressive and a way that society allows us to declare our deeply held convictions and commitments, thereby reinforcing those inner values. While the foregoing section focused on social signaling to build social group solidarity and contribute to the development of social norms, this section addresses *self-signaling*, the importance of special

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signaling and information costs for legislators and judges); Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. 359, 418 (2013) (discussing subtle signaling to the courts by the executive branch); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 419 (2000) (discussing signaling effects and information costs for voters and government officials); James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction*, 45 AM. J. POL. SCI. 84, 97–98 (2001) (interbranch policy preference signaling); Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 766–83 (2006) (discussing information costs for courts and regulatory signaling); McAdams, *An Attitudinal Theory*, *supra* note 7, at 361–62 (discussing signaling between the citizenry and the legislature).

<sup>162</sup> See McAdams, *An Attitudinal Theory*, *supra* note 7, at 360–62; see also Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis*, 103 VA. L. REV. 1809, 1826–30 (2017) (discussing the importance of incorporating citizens' willingness-to-pay for moral commitments as a necessary component of regulatory cost-benefit analysis).

<sup>163</sup> See GOSS, *supra* note 6, at 187 (emphasis omitted).

<sup>164</sup> See Roger Brownsword, *Lost in Translation: Legality, Regulatory Margins, and Technological Management*, 26 BERKELEY TECH. L.J. 1321, 1356 (2011) (discussing "[i]n-person moral coding").



actions for developing our internal norms, drive, and self-narrative. Commitment devices—aids to self-control—have received serious academic attention in recent years. For example, in his book *Carrots and Sticks*, Ian Ayres describes in detail the value of sanctioned pledges and commitment contracts in achieving personal goals when we otherwise lack self-control.<sup>165</sup> One benefit of registration and certification for personal disarmament is just that—pledges with sanctions can be very effective commitment devices, helping individuals exercise self-control over time, even when the pledge itself is entirely voluntary. The Vars proposal (using self-registration with NICS to prevent gun suicide) builds nicely on this body of scholarly work regarding such commitment devices.<sup>166</sup>

Yet there is something here besides bolstering self-control, as valuable as that goal may be.<sup>167</sup> Two other new lines of scholarship have emerged in the last two decades about the interplay between decisions and internal character development, how a person's sense of identity influences their behaviors, and how their behaviors in turn reshape their sense of identity. In economics, an influential article by George Akerlof and Rachel Kranton,<sup>168</sup> published in 2000, helped launch a line of academic inquiry about the sense of identity as a type of utility or source of value that factors into behavioral decisions alongside external incentives,<sup>169</sup>

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<sup>165</sup> See IAN AYRES, *CARROTS AND STICKS* 3–7 (2010); see also IAN AYRES, *OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS* 1–9 (2005) (incorporating the insights of options theory into our legal rules). See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2009) (arguing for opt-in and opt-out rules that maximize individuals' welfare and help them avoid framing mistakes).

<sup>166</sup> See sources cited *supra* note 4.

<sup>167</sup> Of course, the individuals who seek certification as “gunless” already do not own guns, do not want to own guns, and they are less likely to lapse from this commitment due to a sudden impulse or simple lack of self-control.

<sup>168</sup> See George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 Q.J. ECON. 715, 718–27 (2000).

<sup>169</sup> See, e.g., Robert Ahdieh, *Beyond Individualism in Law and Economics*, 91 B.U. L. REV. 43, 59–60 (2011) (describing the Akerlof-Kranton idea and observing, “[i]t is hard to overstate the implications of this approach in important areas of legal analysis”); George A. Akerlof & Rachel E. Kranton, *Identity and the Economics of Organizations*, 19 J. ECON. PERSP. 9, 10–11 (2005); Marion Crain, *Managing Identity: Buying Into the Brand at Work*, 95 IOWA L. REV. 1179, 1206 (2010) (describing identity-based brand management as an effective internal branding program, which imbues work-related behaviors with special emotional significance); Rafael Gely, *The Law and Economics of Identity*, 14 DUKE J. GENDER L. & POL'Y 229, 230 (2007) (applying the Akerlof-Kranton model to gender identity and its legal ramifications); Claire A. Hill, *The Law and Economics of Identity*, 32 QUEEN'S L.J. 389, 435–39 (2007) (extending the Akerlof-Kranton ideas to other areas of law); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1320 (2003) (“[The Akerlof-Kranton model] puts forth a theory for why individuals act against their own interests in order to preserve or augment their group identity. Flouting the perceived ideals of the group generates personal anxiety over self-image.”); Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1597 (2018) (“This authentic narrative of firm purpose and identity could prove incredibly powerful

sometimes inducing individuals to do things that appear to outsiders to be contrary to their self-interest. Akerlof and Kranton offer as examples self-mutilation (tattoos or piercings), gender-selection in careers, alumni giving, and mountaineering.<sup>170</sup> A parallel line of scholarship in the field of psychology and cognitive science has focused on “self-signaling” as an aspect of moral development over time<sup>171</sup> and as a motivation or incentive for making individual choices.<sup>172</sup> Both of these lines of newer research show that formal legal actions, like various sorts of registrations with a government agency such as legal declarations, filing claims in court, and legally-binding commitments, are important self-signaling devices, adding to or detracting from our sense of moral character or social identity. One of the most recent articles explains, “[r]ecent research suggests people are particularly motivated to engage in self-signaling behaviors when they perceive their actions as ‘self-diagnostic’ (i.e., representative of the type of person they are).”<sup>173</sup> Individuals who conscientiously or scrupulously object to personal gun ownership would derive subjective utility from being able to make an official legal declaration to this effect,<sup>174</sup> especially

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in motivating employees to be more productive, customers to be more loyal, and investors to be more patient with the company.”); Kristen Underhill, *When Extrinsic Incentives Displace Intrinsic Motivation: Designing Legal Carrots and Sticks to Confront the Challenge of Motivational Crowding-Out*, 33 YALE J. ON REG. 213, 245–47 (2016) (discussing the tension between commitment devices and preexisting internal drivers).

<sup>170</sup> See Akerlof & Kranton, *supra* note 168, at 721–23.

<sup>171</sup> Although this field may be less familiar to legal commentators than economics, the two main seminal works in this line of scholarship appear to be Ronit Bodner & Drazen Prelec, *Self-Signaling and Diagnostic Utility in Everyday Decision Making*, in 1 THE PSYCHOLOGY OF ECONOMIC DECISIONS 105 (Isabelle Brocas & Juan D. Carrillo eds., 2003), and Roland Bénabou & Jean Tirole, *Intrinsic and Extrinsic Motivation*, 70 REV. ECON. STUD. 489 (2003). Like the Akerlof-Kranton article in economics, these two teams of researchers triggered a line of fruitful scholarship in this area, expanding and extending the original ideas. See, e.g., Roland Bénabou et al., *Narratives, Imperatives, and Moral Reasoning* (Nat’l Bureau of Econ. Research, Working Paper No. 24798, 2018); Roland Bénabou & Jean Tirole, *Identity, Morals, and Taboos: Beliefs as Assets*, 126 Q.J. ECON. 805 (2011) [hereinafter Bénabou & Tirole, *Identity, Morals and Taboos*]; Maferima Touré-Tillery & Alysson E. Light, *No Self to Spare: How the Cognitive Structure of the Self Influences Moral Behavior*, 147 ORG. BEHAV. & HUM. DECISION PROCESSES 48 (2018).

<sup>172</sup> See, e.g., Jean-Pierre Dubé et al., *Self-Signaling and Prosocial Behavior: A Cause Marketing Mobile Field Experiment 1* (Nat’l Bureau of Econ. Research, Working Paper No. 21475, 2015) (providing empirical evidence that “supports the self-signaling theory whereby price discounts crowd out a consumer’s self-inference of altruism from buying a good bundled with a charitable donation”); Olivia Johnson & Veena Chattaraman, *Conceptualization and Measurement of Millennial’s Social Signaling and Self-Signaling for Socially Responsible Consumption*, 18 J. CONSUMER BEHAV. 32, 34–35 (2019); Chang-Yuan Lee et al., *Past Actions as Self-Signals: How Acting in a Self-Interested Way Influences Environmental Decision Making*, 11 PLOS ONE 4–8 (2016) (showing how self-signaling from past choices and commitments shapes future decision making); Katie Baca-Motes et al., *Commitment and Behavior Change: Evidence from the Field*, 39 J. CONSUMER RES. 1070, 1071 (2013) (examining the effect of hotel guests’ symbolic commitment to practice environmentally friendly behavior during their stay).

<sup>173</sup> See Touré-Tillery & Light, *supra* note 171.

<sup>174</sup> See Hill, *supra* note 169, at 406–11 (explaining “identity payoff[s]”).

if there were some cost or consequence attached.<sup>175</sup> Giving these individuals an increased sense of subjective utility produces an increase in social welfare that is Pareto-superior, as it does not harm anyone else. Many of us in the nonviolent community would find this tremendously satisfying and subjectively beneficial. As one recent commentator put it, “[p]eople draw conclusions about their own motives based on their actions . . . more salient incentives may be more likely to influence self-signaling.”<sup>176</sup> At the same time, this act of registration and certification would predictably strengthen the resolve of these individuals on this and related issues, according to both economics and cognitive science research, as the self-signaling effect informs the future sense of identity or internal moral narrative; the commitment itself makes the issue more important to the person.<sup>177</sup>

In this sense, registration and certification would be what I would call a *commitment intensifier*. We often infer our own current preferences from our own past actions and behaviors.<sup>178</sup> Researchers describe a self-signaling phenomenon of “escalating commitments,” where people continue to invest in an aspect of their identity, such as family, neighborhood, or career, where they have already achieved illustrious results, even beyond the point of positive marginal returns.<sup>179</sup> When we solemnize a commitment, or make it official in the legal sense, we are more likely to continue to build on that commitment and intensify it in the future. To the extent that the commitment itself is socially useful (and most agree that reduced gun prevalence is),<sup>180</sup> a legal device that functions as a commitment intensifier would be

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<sup>175</sup> Unsurprisingly, costly commitments are stronger self-signaling devices. See Baca-Motes et al., *supra* note 172, at 1079 (“[W]hen an initial prosocial act is costly to the individual, it serves as a signal to the self that she is a prosocial person, which in turn increases the likelihood that she will behave in ways consistent with that self-image.”).

<sup>176</sup> See Underhill, *supra* note 169, at 245.

<sup>177</sup> See DAN ARIELY, *THE HONEST TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES* 122–23 (2013) (explaining self-signaling and applying it to examples of personal morality).

<sup>178</sup> See Lee et al., *supra* note 172, at 2; Bénabou & Tirole, *Identity, Morals and Taboos*, *supra* note 171, at 810 (“When a person has been induced to behave prosocially or selfishly, or just provided with signals presumed to be informative about his morality, his choices in subsequent, unrelated interactions are significantly affected.”).

<sup>179</sup> See Bénabou & Tirole, *Identity, Morals and Taboos*, *supra* note 171, at 838–39.

<sup>180</sup> See *Guns*, GALLUP NEWS, <https://news.gallup.com/poll/1645/guns.aspx> [<https://perma.cc/8JDB-YUMD>] (showing through various poll questions that most Americans want stricter gun laws, though not a complete handgun ban); see also *Guns*, POLLING REP., <https://www.pollingreport.com/guns.htm> [<https://perma.cc/H7WH-NGAR>] (similar results); Margaret Talbot, *The 2020 Democrats and the New Politics of Gun Violence*, NEW YORKER (Dec. 8, 2019), <https://www.newyorker.com/magazine/2019/12/16/the-2020-democrats-and-the-new-politics-of-gun-violence> [<https://perma.cc/4LWK-RFRK>]; Rachel Treisman, *Poll: Number of Americans Who Favor Stricter Gun Laws Continues to Grow*, NPR (Oct. 20, 2019, 7:01 AM), <https://www.npr.org/2019/10/20/771278167/poll-number-of-americans-who-favor-stricter-gun-laws-continues-to-grow> [<https://perma.cc/8V8C-55Q4>].

socially beneficial. “Indeed, from a society’s perspective, if people have socially desirable identities (such as being a ‘good citizen’), getting them to behave desirably is cheap; the question then becomes how to get people to adopt those identities.”<sup>181</sup>

At the same time, formalities also serve an *ex ante* purpose, highlighting for ourselves the gravity of the commitment we are about to make.<sup>182</sup> The legal formalities, warnings, and declarations involved in registration and certification would aid in isolating and solemnizing this choice; it would force the individual to deliberate about and reflect more deeply upon the reasons for doing it. In this sense, I would call registration and certification a *salience intensifier*, and this is in line with numerous salience intensifiers (solemn, vivid warnings and disclosures) in our legal system when individuals are waiving rights or incurring liabilities.

Solemn declarations—actual vows, not mere promises—help shape the way we think about ourselves and the world, our sense of personal dignity, and what we expect others to expect of us, especially those closest to us.<sup>183</sup> Pragmatically, registration and certification as gunless changes the registrant, from someone who is casually—or incidentally—not presently a gun owner, into a person who has officially and personally repudiated guns and gun violence. Such formalized and publicly witnessed decisions are integrated into our sense of identity and reprioritize our internal values and preferences—we see ourselves differently, and we subjectively identify with others who make a similar commitment to nonviolence.<sup>184</sup>

### C. *Market Signaling and Market Responses*

The question of whether owning a gun makes one safer or less safe is a point of intense disagreement in academia, and the arguments are well-rehearsed. Even apart from problems of bias or partisanship, however, there is a chronic information deficit: nobody knows for certain exactly how many guns are in

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<sup>181</sup> See Hill, *supra* note 169, at 395.

<sup>182</sup> See Chris Brummer, *How International Financial Law Works (And How It Doesn't)*, 99 GEO. L.J. 257, 272 (2011) (“[L]egalization may describe one element helping to underscore the degree of seriousness and solemnity with which a party undertakes a commitment . . . .”); see also MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 20 (AM. BAR ASS'N 2018) (“Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.”).

<sup>183</sup> See Akerlof & Kranton, *supra* note 168, at 727–32 (theoretical modeling of the mechanism).

<sup>184</sup> See Hill, *supra* note 169, at 439–42 (discussing how law shapes identities and evaluating this from a cost-benefit perspective).

circulation, exactly how many people own guns, how often guns are used in legitimate self-defense or prevention of crime, or even what the crime rates are for every locale due to underreporting problems.<sup>185</sup> Nevertheless, one sector of our society can transcend the bias problem, and potentially part of the data deficiency problem, due to a strong, direct financial interest in accurately answering questions of risk: private insurers. Insurers have a direct profit incentive to conduct their own sophisticated actuarial and statistical research to identify predictors—on a granular level—for having to pay out claims.<sup>186</sup> Insurers providing liability coverage for homeowners or businesses—and health or life insurance for individuals—invest heavily in determining risk factors so that they can price their policies accordingly.<sup>187</sup> These firms can determine whether gun ownership makes a person a better or worse risk from an insurer's standpoint, although traditionally insurers have not asked prospective policyholders about gun ownership and most claim they have not tracked claims in this regard.<sup>188</sup> Their profit incentives offset any political considerations about controversial issues like guns.<sup>189</sup> An insurance firm's legal duty is to maximize profit for their shareholders, not to venerate the Second Amendment. Accurately assessing risks is necessary for pricing policies within the margin of profitability, given the likelihood and scope of payouts or claims on the policy.<sup>190</sup>

Suppose that insurers could reliably identify either gun owners or nonowners, whether through the individuals' self-disclosures or through statistical correlations that serve as accurate predictors. The firms would have a market incentive to adjust pricing of policies based on this predictor, along with all the others predictors they consider. As one commentator put it, "[b]y analyzing greater amounts of data, insurers will be able to more

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<sup>185</sup> See RAND CORP., *THE SCIENCE OF GUN POLICY: A CRITICAL SYNTHESIS OF RESEARCH EVIDENCE ON THE EFFECTS OF GUN POLICIES IN THE UNITED STATES* 275–79 (2018) (summarizing a comprehensive meta-study of all extant research on defensive gun use and explaining the elusive problems with measurement, including underreporting); see also Richard T. Boylan, *Imputation Methods Make Crime Studies Suspect: Detecting Biases via Regression Discontinuity* (Jan. 2, 2019) (pre-publication manuscript on file with author).

<sup>186</sup> See Jane Bambauer & Tal Zarsky, *The Algorithm Game*, 94 NOTRE DAME L. REV. 1, 46 (2018) (describing insurer investments in such data before the Affordable Care Act).

<sup>187</sup> See *id.*

<sup>188</sup> See Morgan Sherburne, *Insurance Companies Don't Ask About Gun Ownership, U-M Researcher Asks Why*, MICH. NEWS (July 2, 2018), <https://news.umich.edu/insurance-companies-dont-ask-about-gun-ownership-u-m-researcher-asks-why/> [<https://perma.cc/DW5N-CR7W>].

<sup>189</sup> See John V. Jacobi, *The Ends of Health Insurance*, 30 U.C. DAVIS L. REV. 311, 316–17 (1997) (describing competition between insurers for superior risk pricing).

<sup>190</sup> See Jean Lemaire, *The Cost of Firearm Deaths in the United States: Reduced Life Expectancies and Increased Insurance Costs*, 72 J. RISK & INS. 359, 369–71 (2005).

accurately tailor the pricing of their policies, which would increase actuarial fairness, address several longstanding problems related to consumer incentives, and aid insurers' efforts to prevent losses from occurring."<sup>191</sup> If gun ownership predicted an increase in payouts on claims, whether in terms of frequency or sums, eventually nonowners would receive discounted premiums. Of course, if the pro-gun advocates are correct, the financial incentives will run in the opposite direction—and in that case, insurers should *already* be offering price incentives for gun ownership. The latter possibility seems less likely, given that insurers who cover public schools threaten to drop their coverage when the schools announce plans to arm the teachers,<sup>192</sup> a real-world natural experiment that informs the discussion here. This insurer is not engaging in corporate social activism, discussed below, or ideology-based discrimination;<sup>193</sup> instead, this is actuarial risk assessment and risk-based pricing, just as when insurers ask new applicants about their age, education, profession, and participation in risky extracurricular activities like skydiving or heavy drinking.<sup>194</sup> When it comes to guns, the advocates on each side cite widely disparate research as to the risks or lack thereof of gun ownership. Insurers may be the only player in this arena with a direct financial incentive to discover the objective truth.<sup>195</sup> Accurate insurance pricing therefore benefits society as a whole by making affordable insurance more widely available.<sup>196</sup>

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<sup>191</sup> Max N. Helveston, *Consumer Protection in the Age of Big Data*, 93 WASH. U. L. REV. 859, 876 (2016).

<sup>192</sup> See Rebekah Elliott, *The Real School Safety Debate: Why Legislative Responses Should Focus on Schools and Not on Guns*, 57 ARIZ. L. REV. 523, 535 (2015) (describing an incident where the liability insurer for most of Kansas' school districts cautioned that districts permitting employees to carry handguns would lose coverage); Danielle Weatherby, *Opening The "Snake Pit": Arming Teachers in the War Against School Violence and the Government-Created Risk Doctrine*, 48 CONN. L. REV. 119, 172 (2015) (same); Laura Houser Oblinger, Note, *The Wild, Wild West of Higher Education: Keeping the Campus Carry Decision in the University's Holster*, 53 WASHBURN L.J. 87, 116 (2013) ("Some providers covering school districts have already announced that they will drop, or at least decrease, insurance coverage if administrators allow guns in schools.").

<sup>193</sup> See Victor Epstein, *Kansas Law Thrusts Iowa Insurer into Gun Debate*, USA TODAY (July 7, 2013), <https://www.usatoday.com/story/news/nation/2013/07/07/kan-law-thrusts-iowa-insurer-into-gun-debate/2495815/> [<https://perma.cc/9F45-2LRL>] ("It's not a political decision, but a financial one based on the riskier climate it estimates would be created, the insurer said.").

<sup>194</sup> See George L. Priest, *A Principled Approach Toward Insurance Law: The Economics of Insurance and the Current Restatement Project*, 24 GEO. MASON L. REV. 635, 643–44 (2017) (discussing the practice of segregating risks by risk level to reduce risk variance).

<sup>195</sup> See Kyle Logue & Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 TAX L. REV. 157, 214–15 (2003) (arguing that insurance pricing is a fairer method for wealth redistribution than other policy tools).

<sup>196</sup> See Priest, *supra* note 194, at 646 ("[I]t is well established that the more precisely insurers can accurately segregate risks by insurance discrimination, the more broadly insurance can be offered in the society.")

A fascinating 2018 article in *The Actuary*, the trade journal for the national Society of Actuaries, explored the risks of gun ownership from an actuarial-insurance perspective.<sup>197</sup> The authors conclude that (1) the death rate for firearms is material, from an insurer's perspective; (2) insurance underwriting usually overlooks firearm ownership; and (3) the risks involved with gun ownership are significantly larger than at least one factor (scuba diving) that insurance underwriting routinely considers in pricing policies.<sup>198</sup> The article ends with an open call to action for actuaries nationwide to begin tracking and evaluating the risks of gun ownership for insureds:

Actuaries have unique skills in measuring and managing risk. We are experts in mortality analysis, skilled in data analytics and model building, and we can analyze the problem objectively. As a profession, we must employ our skills and talents to help address the economic, mortality and morbidity impact of gun violence.<sup>199</sup>

Insurers' incentives normally pass through to their customers, and this in turn shapes the behavior of the insured.<sup>200</sup> In other words, not only would insurers have the opportunity and incentive to reward nonownership if it were easy to verify this negative, but the reward system would utilize market forces to reduce gun prevalence in society.<sup>201</sup> Of course, insurers would not *have* to consider gun ownership in their individualized or categorized risk assessments. Some may decline to do so for ideological or public relations reasons, or because they think that identifying some nonowners is still not enough information for pricing, or because they think gun ownership is insignificant compared to other risk factors. Even so, in a market where multiple insurers compete with each other for profitability, share price, and consumer market share, there is an incentive for firms to utilize as much information as possible, to fine-tune the accuracy of their risk assessments and policy pricing.<sup>202</sup>

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<sup>197</sup> See Kristen Moore & Craig Reynolds, *Firearm Risk: An Insurance Perspective*, ACTUARY (June/July 2018), <https://theactuarymagazine.org/firearm-risk/#enref-4634-24> [<https://perma.cc/UY37-TJ2T>].

<sup>198</sup> See *id.*

<sup>199</sup> *Id.*

<sup>200</sup> See Bambauer & Zarsky, *supra* note 186, at 1 ("Algorithms attempt to estimate some difficult-to-measure quality about a subject using proxies, and the subjects in turn change their behavior in order to game the system and get a better treatment for themselves . . . . These behavioral changes can then prompt the algorithm to make corrections.").

<sup>201</sup> See Lior Jacob Strahilevitz, "How's My Driving?" For Everyone (And Everything?), 81 N.Y.U. L. REV. 1699, 1699 (2006) (advocating "using reputation-tracking technologies to displace criminal law enforcement and improve the tort system").

<sup>202</sup> See Kenneth S. Abraham, *Efficiency and Fairness in Insurance Risk Classification*, 71 VA. L. REV. 403, 403–05 (1985).

Some legislators and commentators have proposed a law requiring liability insurance for gun owners.<sup>203</sup> These proposals have some merit, at least for unintentional injuries, but that is not the argument here. Instead, the point here is that allowing gunless individuals to self-register and obtain official certification would provide useful, reliable information to insurers for risk pricing that is already going on.<sup>204</sup> In other words, gun ownership may be a reliable predictor of current types of insurance claims (i.e., injuries and property damage) that may result even indirectly from gun ownership, such as injuries or damage from others' guns. Alternatively, it is possible that a policyholder files a claim for injuries or property damage done by another, but that harm became more likely once the policyholder had guns. My proposal is that identifying nonowners (through registration and government certification) would provide superior information to the insurers compared to what they currently have available.

At present, insurers have no way to know which insureds own guns, except for asking a few questions on policy applications and trusting the answers provided. Many insurance applicants are untruthful, of course, creating a lemons effect<sup>205</sup> for insurers (a cost they pass through to their customers). The type of official certification described here would at least identify, with near certainty, some of the negatives, that is, the nonowners. Reliable information about even a portion of the insureds would be helpful.<sup>206</sup> Another part of the current information deficit facing insurers is that there is little or no research done by the federal

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<sup>203</sup> See Rob Hillenbrand, Note, *Heller on the Threshold: Crafting a Gun Insurance Mandate*, 95 B.U. L. REV. 1451, 1455–56 (2015) (arguing in favor of state experimentation with such mandates); Tom Baker & Thomas O. Farrish, *Liability Insurance & the Regulation of Firearms*, in *SUING THE GUN INDUSTRY* 292 (Timothy D. Lytton ed., 2005). For academic commentary arguing against such proposals, see, e.g., George A. Mocsary, *Insuring Against Guns?*, 46 CONN. L. REV. 1209, 1212–13 (2014) (arguing against gun insurance proposals).

<sup>204</sup> For an excellent and thorough survey of gun-related insurance occurrences and claims, and state-by-state relevant legal rules impacting coverage, see Rina Carmel et al., *Caught in the Cross Fire: Impact of Coverage Issues, Defense Issues, and Firearm Legislation for Gun Claims* (ABA Insurance Coverage Litigation Committee CLE Seminar, Mar. 7, 2014), <http://ssrn.com/abstract=2411794> [<https://perma.cc/FYY9-HGXS>].

<sup>205</sup> A “lemons effect” describes the way in which certain undesirable items in a market (that is, counterfeits, unreliable or low-quality lookalikes, etc.), diminish the value of all the comparable items in that market, including the high-quality ones, if consumers cannot easily distinguish quality or counterfeits before purchase. See George Akerlof, *The Market for ‘Lemons’: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 495 (1970).

<sup>206</sup> As George Priest put it many years ago, “Applied to insurance, the law of large numbers means that as one increases the number of insured persons possessing independent and identically-valued risks, one increases the accuracy of prediction of expected loss for each individual.” George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1540 (1987).



agencies that normally study and regulate health and safety.<sup>207</sup> Firearms and ammunition are outside the purview of safety testing or risk assessment that the Consumer Products Safety Commission (CPSC) conducts (and publishes) for virtually every other consumer item,<sup>208</sup> for example. Insurers usually benefit from such information, especially about products that cause tens of thousands of deaths every year, whether for users, intended victims, or unintended victims (innocent bystanders).<sup>209</sup> Since the 1970s, federal law has prohibited the CPSC from conducting the usual safety research about guns, such as whether a certain model or brand is prone to accidental discharge or jamming.<sup>210</sup> The black box of unknowns surrounding the risks of firearm ownership needs remediation, and that could take place through market responses to the signaling of self-registration and certification. Providing the private insurance industry with more reliable information may prove more effective than some government regulations would, at least in the area of firearm risk management. Some commentators have argued that private insurance often regulates risk better than regulatory agencies, as insurers can require specific investments in risk reduction, offer premium discounts, and so on.<sup>211</sup>

Even apart from risk assessment and insurance pricing, market signals can also trigger ideological or “social action” responses. For example, after the 2018 Parkland school massacre, Dick’s Sporting Goods and Walmart stopped carrying certain guns or ammunition, certain banks imposed restrictions on

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<sup>207</sup> See Olivia Li, *Cars, Toys, and Aspirin Have to Meet Mandatory Safety Standards. Guns Don’t. Here’s Why.*, TRACE (Jan. 19, 2016), <https://www.thetrace.org/2016/01/gun-safety-standards/> [<https://perma.cc/V4AP-KXD8>].

<sup>208</sup> See COOK & GOSS, *supra* note 23, at 123–24 (describing statutory exclusions for guns from consumer product safety regulations).

<sup>209</sup> See VOLSKY, *supra* note 144, at 125–26 (discussing the increasing problem with this information deficit).

<sup>210</sup> See Federal Election Campaign Act of 1976, Pub. L. No. 94-284, § 3(e), 90 Stat. 503, 504 (“The Consumer Product Safety Commission shall make no ruling or order that restricts the manufacture or sale of firearms, firearms ammunition, or components of firearms ammunition, including black powder or gunpowder for firearms.”); see also COOK AND GOSS, *supra* note 23, at 123–24; GOSS, *supra* note 6, at 78–79 (describing the legislative maneuvering in the 1970s to ensure that there would be no federal safety specifications or regulations for firearms or ammunition); VOLSKY, *supra* note 144, at 125–26.

<sup>211</sup> See Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 197 (2012) (“Successful regulation of behavior requires information in setting standards, licensing conduct, verifying outcomes, and assessing remedies. In various areas, the private insurance sector has technological advantages in collecting and administering the information relevant to setting standards and could outperform the government in creating incentives for optimal behavior.”); *id.* at 247; see also Jeffrey Kehne, Note, *Encouraging Safety Through Insurance-Based Incentives: Financial Responsibility for Hazardous Wastes*, 96 YALE L.J. 403, 403 (1986) (arguing that the potential benefits of insurance-based incentives in the arena of hazardous wastes would justify revision of existing financial responsibility and liability standards).

corporate clients regarding assault weapons or bump stocks, mutual funds began offering index funds that avoid gun companies, and some airlines and rental companies ended their relationship with the NRA.<sup>212</sup> Depending on one's position on the issue (or any issue that corporations champion), such developments are either virtuous or vicious, but such corporate activism has become an inescapable part of modern society, as have similarly motivated consumer boycotts. It is also arguable that the situation is not in fact new, given that before these changes, the firms were cooperating with the firearms industry and subsidizing the NRA—the position of the companies has changed, but the involvement with socially controversial issues has always been there.

In this environment, it is likely that there would be a marketplace response to certification of gunless individuals—discounts, rebates, promotions, and so on. Such a reaction is merely an extension of the signaling-and-social-norms phenomenon explained above, except that here, the response is from *outside* the movement itself—the reaction of the larger society to a movement that has coalesced to the point where its most ardent members are easily identifiable. This is one of the goals of the self-registration proposal: we must change the culture about guns, not just our laws.

#### *D. Reducing the Gun Supply Without Restricting It*

A program of voluntary registration and certification for those who want to be gunless could also help reduce the aftermarket firearm supply without restricting the rights of lawful firearm purchasers and owners. To the extent that gun crime depends on the availability of guns themselves, reducing the stock of guns in circulation would reduce, even if it did not eliminate, the availability of guns for would-be criminals. A persistent policy conundrum has been how to reduce the number of guns in circulation without restricting the availability of guns for those who want to exercise their Second Amendment rights. Policies that seek to reduce gun violence by restricting sales of guns, or even certain types of guns, run into this conundrum—the laws inevitably impact nonviolent, law-abiding gun enthusiasts at the same time, who may complain that the restrictions infringe on their Second Amendment rights. The same problem affects well-intentioned regulations about transporting, storing, and using guns.

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<sup>212</sup> See Lin, *supra* note 169, at 1556–57.

The proposal outlined in this article avoids this problem, but still has the potential to reduce the number of guns in circulation through voluntary relinquishment and abstinence from gun purchases. Reducing the supply of firearms to the black market without restricting the legal rights of lawful gun owners would be a breakthrough in firearm policy. Suppose the movement-signaling effects of the program convince more Americans to forsake gun ownership, the self-signaling or commitment-enhancing effects result in many nonowners remaining gunless for a longer term, and the market-signaling effects make some individuals more inclined to avoid gun ownership. These effects would reduce the number of privately-owned guns overall, which would have the advantage of shrinking the black market for crime guns.

Firearm manufacturers sell their products to federally licensed firearm dealers, or to government entities such as law enforcement and the military.<sup>213</sup> Licensed firearm dealers, in turn, sell guns (almost) exclusively to purchasers who pass a NICS background check.<sup>214</sup> Even at gun shows, the licensed firearm dealers, who constitute most of the vendors there, must conduct background checks for all purchases.<sup>215</sup> The remaining vendors are private individuals selling items from their own collection or stockpile of guns.<sup>216</sup> This means that every gun that ends up being used in a crime,<sup>217</sup> with the minor exception of “ghost guns” (assembled entirely from parts by private gunsmiths),<sup>218</sup> originally entered the stream of commerce via a legal sale to a lawful purchaser who passed a background check.

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<sup>213</sup> See Daniel W. Webster et al., *Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking*, 86 J. URB. HEALTH 525, 526–27 (2009). For the most recent data, see generally BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES, REPORT: FIREARMS COMMERCE IN THE UNITED STATES, ANNUAL STATISTICAL UPDATE (2018).

<sup>214</sup> See *About NICS*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/services/cjis/nics/about-nics> [<https://perma.cc/NE2V-7KTN>].

<sup>215</sup> See 27 C.F.R. § 478.100(c); BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, IMPORTANT NOTICE TO FFLS AND OTHER PARTICIPANTS AT GUN SHOWS (2016), <https://www.atf.gov/file/56651/download> [<https://perma.cc/CTA3-KLWQ>].

<sup>216</sup> See Garen J. Wintemute et al., *Gun Shows and Gun Violence: Fatally Flawed Study Yields Misleading Results*, 100 AM. J. PUB. HEALTH. 1856, 1857 (2010) (refuting a recent flawed study and explaining the current data and scholarship on gun shows).

<sup>217</sup> See Cook et al., *Sources of Guns*, *supra* note 88, at 30. A study examining juvenile criminals involved in gun-related violence revealed that 70 percent of the crime guns were acquired from private transactions such as a family member, friend, or other social connection; only 10 percent of the inmates purchased a gun from a licensed dealer. See *id.*

<sup>218</sup> See *Def. Distributed v. U.S. Dep’t of State*, 838 F.3d 451, 456 (5th Cir. 2016) (injunction sought to stop Directorate of Defense Trade Controls from enforcing 3-D printed gun regulations); James B. Jacobs & Alex Haberman, *3D-Printed Firearms, Do-It-Yourself Guns, & The Second Amendment*, 80 LAW & CONTEMP. PROBS. 129, 133, 136, 141–46 (2017) (discussing workshop guns and legal restraints).

As one former ATF Director wrote, “[v]irtually every crime gun in the United States starts off as a legal firearm.”<sup>219</sup>

A certain number of crime guns pass directly from the licensed dealer to the prospective criminal, either because the individual, though planning to commit crimes, has no criminal record yet (and can pass a background check),<sup>220</sup> or even because the individual at the time of purchase has no criminal intent, but makes this decision later.<sup>221</sup> The end-user may also obtain the gun semidirectly through a straw purchaser.<sup>222</sup> A small percentage of licensed dealers knowingly sell to criminals, either through obvious straw purchasers or phony background checks: “A national study of gun trafficking investigations found that corrupt retail gun dealers accounted for more guns diverted into the illegal market than any other single trafficking channel.”<sup>223</sup> Even apart from these notorious bad apples, the number of licensed gun dealers in a locale strongly correlates to the number of intimate partner homicides in the same area.<sup>224</sup> These facts would justify a personal consumer boycott; if more people choose to be permanently gunless, fewer gun retailers would open or stay open.

Most crime guns, however, do not come directly from the dealer, but instead belonged originally to someone else, i.e., a lawful purchaser.<sup>225</sup> “Eighty-five percent of guns traced to crime were recovered from someone who was not the original retail purchaser.”<sup>226</sup> A would-be criminal can buy a used gun from an unlicensed private seller in most states without a background check, but this involves the risk that the seller may remember the purchaser later when authorities investigate a crime. A safer

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<sup>219</sup> DEPT. OF TREASURY & BUREAU OF ALCOHOL, TOBACCO, FIREARMS, FOLLOWING THE GUN: ENFORCING FEDERAL LAWS AGAINST FIREARMS TRAFFICKERS iii (2000) <https://www.hsdl.org/?view&did=1622> [<https://perma.cc/2RV8-KHF9>].

<sup>220</sup> See Donohue et al., *supra* note 20, at 206–07; see also Philip J. Cook, *Gun Theft and Crime*, 95 J. URB. HEALTH 305, 305–06 (2018); Hemenway et al., *supra* note 12.

<sup>221</sup> See Donohue et al., *supra* note 20, at 203–06.

<sup>222</sup> See *Abramski v. United States*, 134 S. Ct. 2259, 2263 (2014) (conviction of straw purchaser); *United States v. Love*, 767 F. Appx. 470, 471 (4th Cir. 2019) (defendant used straw purchaser); *United States v. Francis*, 891 F.3d 888, 895, 898 (10th Cir. 2018) (discussing the possibility of sentence enhancement for straw purchaser).

<sup>223</sup> See Webster et al., *supra* note 213, at 526.

<sup>224</sup> See Richard Stansfield & Daniel Semenza, *Licensed Firearm Dealer Availability and Intimate Partner Homicide: A Multilevel Analysis in Sixteen States*, 126 PREVENTATIVE MED. 1, 4 (2019).

<sup>225</sup> See Philip J. Cook et al., *The Last Link: From Gun Acquisition to Criminal Use*, 22 J. URB. HEALTH 1 (2019) (“Every transaction with a legitimate gun dealer . . . entails a background check to determine if the would-be buyer is disqualified by reason of his or her criminal history or other reason. As a result, relatively few active criminals buy from gun stores, but rather obtain firearms from their social connections or make other off-the-books transactions that constitute the underground gun market.”).

<sup>226</sup> See Webster et al., *supra* note 213, at 526 (citing data from the Bureau of Alcohol, Tobacco & Firearms (ATF)).

option, hypothetically, is to acquire a gun by theft or to buy a stolen gun on the black market. Surveys of incarcerated offenders reveal that theft is “the most common way that guns [are] obtained for resale.”<sup>227</sup> Up to five hundred thousand guns come into the hands of criminals every year through theft,<sup>228</sup> constantly replenishing the supply of guns used in crimes and sold on the black market; hundreds of thousands of guns with a zero wholesale basis (stolen) suppresses the prices on black markets, making firearms more affordable for the illegal purchasers. Regular gun owners—the lawful ones—are the inadvertent middlemen between firearm manufacturers and the criminal underworld.

On the black market, or “gray” secondary market,<sup>229</sup> these guns start with a wholesale basis of zero, which lowers the prices on black markets, making firearms more affordable for purchasers with bad intentions.<sup>230</sup> Admittedly, even the higher estimate of five hundred thousand is a tiny fraction of the thirteen or fourteen million new guns sold every year—3 or 4 percent.<sup>231</sup> One implication of this situation is that an abundant supply of legally purchased guns means an abundant supply of guns to steal, so the supply of legal guns will correlate with the supply of crime guns.<sup>232</sup> Conversely, scarcity of legal guns will mean scarcity of crime guns.<sup>233</sup> There is no reason to think that those engaged in illegal activities have infinite resources or infinite access to firearms, or that they are unaffected by price increases due to low

<sup>227</sup> See HEMENWAY, *supra* note 24, at 119.

<sup>228</sup> See *id.* at 118 (estimating the number at five hundred thousand per year, based on a number of studies); Kaste, *supra* note 18 (reporting that an “NPR survey of a sampling of police departments reveals steady increases in reports of guns stolen from vehicles”).

<sup>229</sup> See HEMENWAY, *supra* note 24, at 148–49 (describing internet sales for stolen and trafficked guns).

<sup>230</sup> See Laura C. Morel, *82,000 Stolen Guns Are Missing in Florida*, REVEAL NEWS (Nov. 1, 2017), <https://www.revealnews.org/article/82000-stolen-guns-are-missing-in-florida> [<https://perma.cc/7Q7W-7WGX>] (reporting that legal gun owners are arming criminals at an alarming rate through the interstate black market); see also Jeff Asher & Mai Nguyen, *Guns Laws Stop at State Lines, But Guns Don't*, FIVETHIRTYEIGHT, (Oct. 26, 2017), <https://fivethirtyeight.com/features/gun-laws-stop-at-state-lines-but-guns-dont/> [<https://perma.cc/C8Y3-PPRZ>] (noting that guns are transported in the black market across state lines from lenient gun states to stricter states).

<sup>231</sup> Even so, as a raw number rather than as a percentage, this quantity is substantial, especially if we consider that there must be a finite black-market demand. See Donohue et al., *supra* note 20, at 207–08 (discussing in detail the latest research on stolen guns and their contribution to crime).

<sup>232</sup> See Freskos, *Stolen Guns in America*, *supra* note 19.

<sup>233</sup> Recent empirical evidence supports this claim. See David M. Hureau & Anthony A. Braga, *The Trade in Tools: The Market For Illicit Guns in High-Risk Networks*, 56 CRIMINOLOGY 510, 510 (2018) (“The results of our qualitative research reveal that gang members and drug dealers pay inflated prices for [typically older] handguns diverted by traffickers exploiting unregulated secondary market[s].”).

supply;<sup>234</sup> in fact, most criminal defendants in the United States are low-income or indigent.<sup>235</sup> Not owning any guns reduces the supply of guns in society, and that is one reason not to own. Owning a gun makes one partly responsible (3 or 4 percent per gun owned) for the future aggregate supply of crime guns.<sup>236</sup>

Criminals do not have long-term arsenals;<sup>237</sup> the black market has high turnover and requires constant replenishment of preowned guns.<sup>238</sup> Contrary to the oft-repeated canard that criminals will always have guns, empirical research suggests that many urban centers have fragile illegal gun markets.<sup>239</sup> The evidence suggests that the underground gun market is thin, with a limited number of reliable sellers, unsophisticated buyers, and significant information deficits for both parties.<sup>240</sup> A gang or cartel may maintain an arsenal to help reduce these hurdles, but in turn the leaders have an incentive to jealously guard the weapons they've accrued, rather than make them freely available to all members. There is good reason to believe, therefore, that "[t]hin underground gun markets may be particularly vulnerable to focused gun market disruption strategies."<sup>241</sup> While this point usually arises in the context of proposing tighter regulations of gun sales,<sup>242</sup> a concerted effort toward voluntary disarmament and product-type boycott by regular citizens would also limit the number of firearms

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<sup>234</sup> See Douglas C. Bice & David D. Hemley, *The Market for New Handguns: An Empirical Investigation*, 45 J.L. & ECON. 251 (2002) (analyzing the supply and demand model for market gun transactions with respect to its impact on price, personal income, expenditures on police protection, and lagged violent crime rates).

<sup>235</sup> See Deborah W. Denno, *Testing Penry and Its Progeny*, 22 AM. J. CRIM. L. 1, 65 (1994) (observing that "a wealth of social science research suggests that most criminals are socioeconomically deprived").

<sup>236</sup> Gun owners inadvertently contribute to gun violence by leaving guns in their homes and cars. See J. Weston Phippen, *The Problem With Leaving a Gun in Your Car*, ATLANTIC (Sept. 22, 2016), <https://www.theatlantic.com/news/archive/2016/09/gun-car-theft/501017/> [<https://perma.cc/3YLV-V6DU>] ("[A] new study by researchers at Harvard and Northeastern University [] found thieves steal between 300,000 and 600,000 firearms in the U.S. every year. That's 1,600 stolen guns every day, or more than one per minute.").

<sup>237</sup> The most recent studies indicate that most criminals obtain the guns they use less than six months before committing their crime, and the median is two months, but the average crime gun is nine years old. See Cook et al., *Sources of Guns*, *supra* note 88.

<sup>238</sup> See *id.*

<sup>239</sup> See Anthony A. Braga, *Long-Term Trends in the Sources of Boston Crime Guns*, 3 RUSSEL SAGE FOUND.: J. SOC. SCI. 76, 77–78 (2017) (discussing empirical evidence about illegal gun markets in Detroit, Chicago, and other cities).

<sup>240</sup> See *id.*

<sup>241</sup> *Id.* at 78.

<sup>242</sup> See, e.g., Garen J. Wintemute, *Where the Guns Come From: The Gun Industry and Gun Commerce*, 12 FUTURE CHILD. 55, 60–70 (2002) (discussing the legal and illegal gun markets and suggesting regulatory interventions to limit the diversion of guns from legal markets to illegal users).

available for thieves to replenish the black market gun supply, and would also shrink the market for local gun retailers.

Gun ownership can attract thieves rather than deterring or deflecting them, according to empirical researchers.<sup>243</sup> Guns are valuable loot, with their high resale value and portability,<sup>244</sup> and may be the most inviting item for theft after cash and jewelry.<sup>245</sup> If this is correct, guns often invite crime, rather than deter it.<sup>246</sup> Stolen guns offer a high return on effort compared to other items criminals may steal.<sup>247</sup> The more guns in the arsenal, the more of a haul it would be—the thieves need only wait until nobody is home, or nobody is awake.<sup>248</sup>

Moreover, each person's ownership of a gun encourages others in the community to acquire firearms as well—a reciprocity affect that makes gun prevalence self-perpetuating, even within the law-abiding community. If a primary reason for purchasing firearms is self-defense against armed criminals, then everyone would be better off if no one had a handgun; but if some people have guns, then others need them to defend themselves against those who already have them, and so on. If individuals had an official means to declare their non-ownership, it could mitigate this ratchet effect on gun prevalence, and may even reverse it. A similar escalation effect applies to the relationship between law-abiding gun owners and crime guns. "Because bad guys illegally carry semiautomatic pistols, law abiding citizens need semiautomatic pistols; because the bad guys illegally carry AR-15s (to counter the semiautomatic pistols), civilians need AR-15s, and so on."<sup>249</sup> Once the "law-abiding" citizens have guns, though, no one

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<sup>243</sup> See Hemenway et al., *supra* note 12 ("Gun owners were also more likely to have guns stolen if they had six or more guns (4.5 vs. 1.7%), owned guns for protection (3.1 vs. 1.0%), carried guns in the past month (5.3 vs. 1.7%), did not store their guns in the safest manner (2.9 vs. 1.0%) and, non-significantly, stored guns in their car (5.7 vs. 2.2%)."); Sacerdote, *supra* note 12, at 108–09 (reviewing empirical research suggesting that guns create an inducement to burglary rather than a deterrent).

<sup>244</sup> See Cook & Ludwig, *supra* note 12, at 78.

<sup>245</sup> See HEMENWAY, *supra* note 24, at 66 ("Homes with firearm collections are considered prime targets for burglars."); Cook & Ludwig, *supra* note 12, at 98 ("[G]uns are valuable loot because they are portable and readily sold or fenced."); Philip J. Cook & Jens Ludwig, *The Effects of Gun Prevalence on Burglary: Deterrence vs. Inducement 4* (Nat'l Bureau of Econ. Research, Working Paper No. 8926, 2002) ("Guns in the home may pose a threat to burglars, but also serve as an inducement, since guns are particularly valuable loot. Other things equal, a gun-rich community provides more lucrative burglary opportunities than one where guns are more sparse.").

<sup>246</sup> See Donohue et al., *supra* note 20, at 200; Cook & Ludwig, *supra* note 12, at 75–79.

<sup>247</sup> See HEMENWAY, *supra* note 24, at 118 (recounting testimony from violent offenders about how easy it was to steal guns).

<sup>248</sup> See *id.* at 184–85 (surveying recent studies that show higher gun ownership rates in a locale correlate with higher burglary rates).

<sup>249</sup> See BLOCHER & MILLER, *supra* note 59, at 133.

suggests that the “criminals” just give up and go straight. They simply pursue more and bigger guns. From a utilitarian standpoint, gun ownership for self-defense creates a prisoner’s dilemma. A seldom discussed point in the gun debates is why criminals feel the need to have guns in the first place, if we assume that they already have the advantages of surprise, determination, and physical force. If fewer people had guns, and the population that abstained from ownership could signal their aggregate size in a reliable, official way, fewer would-be criminals would feel the need to waste money and time to get a gun; even though crimes may still occur, they would be violent less often, and would result in fewer fatalities. If the program for voluntary registration and certification became popular, there would be less reason for a criminal to invest in a firearm and take on the associated risks of acquiring it and carrying it.

Conversely, suppose that firearm ownership presents a crowding-out problem, at least at the margins, by crowding out other means of self-protection and crime reduction, some of which are more efficient in terms of social welfare.<sup>250</sup> Crowding can occur either through opportunity costs, as when money invested in firearms is then not available for upgrades to an electronic security system, or through the perceived diminishing marginal returns of alternative methods.<sup>251</sup> Better locks, appropriate fencing, owning a dog, and similar unexciting decisions reduce the likelihood of criminal attacks, but gun ownership nudges these other things out of consideration. To the extent that the proposal in this article reduces gun ownership through voluntary choices, it could also increase the use of other safety precautions, many of which could have positive externalities or provide more benefits than gun ownership offers.

Voluntary reductions in gun ownership can also reduce the number of gun tragedies—again, without the problem of placing restrictions on those who want to own guns. Family arguments turn violent, tensions with neighbors escalate into armed confrontations,<sup>252</sup> and road rage incidents spiral out of control, even for the otherwise law-abiding citizen.<sup>253</sup> Alcohol and drug abuse easily makes otherwise lawful gun owners a danger

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<sup>250</sup> See generally Emad H. Atiq, *Why Motives Matter: Reframing the Crowding Out Effect of Legal Incentives*, 123 YALE L.J. 1070, 1072 (2014).

<sup>251</sup> See *id.*

<sup>252</sup> See *Goodson v. State*, 824 S.E.2d 371, 373–74, 377 (Ga. 2019) (holding defendant’s claim of self-defense unavailing when he shot the victim (an argumentative neighbor) as he turned to flee, and continued shooting after the victim was on the ground and no longer posed any threat).

<sup>253</sup> See Donohue et al., *supra* note 20, at 6–8.



to themselves or others.<sup>254</sup> More than twenty thousand American gun owners use their firearm to commit suicide every year,<sup>255</sup> and the correlation between having a firearm in the home with suicide is well-documented.<sup>256</sup> The Vars proposal addresses the problem of suicide by gun for those who recognize that they are at risk; the proposal in this article would also help reduce suicides for those who have no history of depression or suicidal thoughts, but who might experience such urges in the future, perhaps due to unforeseen changes in circumstances. The point here is that if voluntary disarmament reduces both the number of guns and the number of households that have guns, then there should be a corresponding drop in these tragedies—fewer arguments that turn fatal, fewer misuses of firearms related to intoxication, and fewer suicides. Domestic violence, including intimate partner homicide, has a disturbingly high correlation with gun ownership;<sup>257</sup> voluntary reduction in firearm ownership could reduce the number of intimate partner shootings and homicides.

Similarly, fewer gun owners would mean fewer accidental shootings, which occur every day in America.<sup>258</sup> Estimates of accidental or unintentional nonfatal shootings per year number more than sixteen thousand,<sup>259</sup> based on the Center for Disease Control's (CDC) data of hospital emergency room

<sup>254</sup> See Haley Weiss, *The Disturbing Trend Behind America's Soaring Gun Deaths*, ATLANTIC (Dec. 21, 2018), <https://www.theatlantic.com/health/archive/2018/12/gun-deaths-city-murders-suicides/578812> [<https://perma.cc/873F-2G4E>]; *Alcohol Poisoning Deaths*, CTR. FOR DISEASE CONTROL & PREVENTION (Jan. 2015), <https://www.cdc.gov/vitalsigns/alcohol-poisoning-deaths/index.html> [<https://perma.cc/JH9C-HWAU>] (reporting that there are approximately 2,200 alcohol poisoning deaths in the United States per year); *What New Opioid Laws Mean for Pain Relief*, HARV. HEALTH PUB. (Oct. 2018) <https://www.health.harvard.edu/pain/what-new-opioid-laws-mean-for-pain-relief> [<https://perma.cc/U8CW-G327>] (reporting that patients are legally prescribed opioids by their doctors, resulting in more than 115 deaths per day in the United States); Oquendo, *supra* note 21.

<sup>255</sup> See Simonetti & Rowhani-Rahbar, *supra* note 22.

<sup>256</sup> See sources cited *supra* note 23.

<sup>257</sup> See, e.g., Natalie Nanasi, *Disarming Domestic Abusers* 5 (Mar. 12, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3339061> (noting that the mere presence of a gun in a domestic violence situation increases the likelihood of homicide by 500 percent); Aaron J. Kivisto et al., *Association of State Firearm Legislation With Female Intimate Partner Homicide*, 56 AM. J. PREVENTATIVE MED. 311 (2019); Aaron Edward Brown, *This Time I'll Be Bulletproof: Using Ex Parte Firearm Prohibitions to Combat Intimate-Partner Violence*, 50 COLUM. HUM. RTS. L. REV. 159 (2019) (arguing in favor of *ex parte* firearm prohibitions due to the high correlations of gun possession and intimate partner homicides); Sarah Martin, *Evidence-Based, Constitutionally-Sound Approaches to Reducing Gun Fatalities in Violent Relationships*, 6 BELMONT L. REV. 245, 253 (2018); Susan B. Sorenson & Douglas J. Wiebe, *Weapons in the Lives of Battered Women*, 92 AM. J. PUB. HEALTH 1412, 1415–16 (2004).

<sup>258</sup> See Deborah Azrael et. al., *The Stock and Flow of U.S. Firearms: Results from the 2015 National Firearms Survey*, 3 RUSSEL SAGE FOUND. J. SOC. SCI. 38, 38–39 (2017) (“[O]f the more than eighty thousand nonfatal firearm injuries, 60,470 were assault related, 15,928 were unintentional . . . injuries . . .”).

<sup>259</sup> See, e.g., *How Gun Policies Affect Unintentional Injuries and Deaths*, *supra* note 24 (number of emergency room discharges for nonfatal firearm injuries).

discharges after treating unintentional, nonfatal gunshot injuries in 2014. Unintentional fatal shootings number around five hundred per year in recent years, according to numerous sources.<sup>260</sup> As Richard Posner and Tomas Philipson observed,

The social costs of guns are not limited to the direct monetary and associated time costs (for search and training) and to their utility in criminal activities, but they include the frequent accidents involving guns, as where a child finds his parents' gun and kills or injures himself or another child with it.<sup>261</sup>

Of course, some other commonplace items, such as knives,<sup>262</sup> hedge trimmers,<sup>263</sup> table saws,<sup>264</sup> and other household items<sup>265</sup> cause even more accidental injuries each year. Even so, most of these other items come under the regulatory purview of the CPSC, which monitors annual accidents, mandates manufacturer safety testing, orders product recalls, and so on—but guns are a statutory exception under the Consumer Product Safety Act.<sup>266</sup> Accidents, including accidents involving children, are part of the tradeoffs involved in the gun ownership decision.<sup>267</sup> Accident avoidance would be one benefit of going gunless, among the many other benefits discussed above.

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<sup>260</sup> See, e.g., Azrael et al., *supra* note 258.

<sup>261</sup> Tomas J. Philipson & Richard A. Posner, *The Economic Epidemiology of Crime*, 39 J.L. & ECON. 405, 411 n.20 (1996).

<sup>262</sup> See Gary A. Smith, *Knife-Related Injuries Treated in United States Emergency Departments, 1990–2008*, 45 J EMERGENCY MED. 315, 315 (2013) (“An estimated 8,250,914 . . . knife-related injuries were treated in US EDs from 1990 to 2008, averaging 434,259 . . . injuries annually, or 1190 per day.”).

<sup>263</sup> See Daniel S. Watson et. al., *Trimming- and Pruning-Related Injuries in the United States, 1990 to 2007*, 72 J. TRAUMA ACUTE CARE SURGERY 257, 257 (2012) (estimating thirty-six thousand emergency room visits per year for trimming/pruning accidents, mostly around the home, and mostly from power tools).

<sup>264</sup> See Kevin C. Chung & Melissa J. Shauver, *Table Saw Injuries: Epidemiology and a Proposal for Preventive Measures*, 132 PLASTIC RECONSTRUCTIVE SURGERY 777, 777 (2013) (study showing that over thirty thousand table saw injuries occur every year).

<sup>265</sup> See U.S. CONSUMER PRODUCTS SAFETY COMM’N, 2017 NEISS DATA HIGHLIGHTS 1 (2017), [https://www.cpsc.gov/s3fs-public/2017-Neiss-data-highlights.pdf?3i3POG9cN.rIyu2ggrsUkD1XU\\_zoiFRP](https://www.cpsc.gov/s3fs-public/2017-Neiss-data-highlights.pdf?3i3POG9cN.rIyu2ggrsUkD1XU_zoiFRP) [<https://perma.cc/D7VN-ZYKE>]; Daniel S. Watson et al., *Snow Shovel-Related Injuries and Medical Emergencies Treated In US Eds, 1990 to 2006*, 29 AM. J EMERGING MED. 11 (2011) (estimating an average 11,500 emergency room visits per year for snow shovel injuries); Gary A. Smith & D. Vollman, *Epidemiology of Lawn-Mower-Related Injuries to Children in the United States, 1990–2004*, 118 PEDIATRICS 273, 273 (2006) (noting children suffered “an average of 9400 injuries annually, or 11.1 injuries per 100,000 US children per year”); Jennifer McGeehan et al., *Escalator-Related Injuries Among Children in the United States, 1990–2002*, 118 PEDIATRICS 279, 281 (2006) (an average of two thousand children injured by escalators per year, based on emergency room visits).

<sup>266</sup> See 15 U.S.C. § 2052(a)(5)(ii)(E) (referencing 26 U.S.C. § 4181(1954)).

<sup>267</sup> See Marjorie S. Hardy et. al., *Behavior-Oriented Approaches to Reducing Youth Gun Violence*, 12 FUTURE CHILD. 101, 107 (2002).

## CONCLUSION

The registration program set forth in this article would help the movement to prevent gun violence to form a collective social identity to disrupt the status quo. Many Americans are currently conscientious abstainers—they see guns as a scourge on our society, a source or symbol of violence, and they would welcome a way to signal their moral opposition to firearms. By providing identification markers such as government-issued certificates declaring individuals as legally “gunless,” these Americans can mobilize to match the intensity of Second Amendment advocates. Pledges, registration, and certification are crucial identification markers that foster group coherence, camaraderie, and recruitment in a social movement. At the same time, registration and certification would aid in formalizing or solemnizing a decision to forsake gun ownership, adding gravitas to this personal choice. Self-signaling devices like this are important for personal growth and moral development. For decades, pro-gun organizations have successfully marshalled their membership to oppose all gun regulations by cultivating an influential social group identification. By contrast, Americans against gun ownership presently have no means of declaring their common identity.

This article provides a roadmap by which Americans who share a genuine commitment to being “gunless” can organize to form a base of grassroots power. As set forth above, such a program would require only minimal additions to the federal and state background check systems that already exist; this is a low-cost, high-benefit proposal. The only burden on the government would be the issuance of a simple certification card to those who voluntarily register. At the same time, the system would be entirely voluntary, honoring the choices and free expression of those who want to renounce gun ownership, while not infringing on the rights of those who want to bear arms. This program would therefore be cost-efficient, in addition to providing sorely needed information that is currently lacking regarding the connections between gun possession, safety, and crime. Insurance companies and other market actors could determine, from an actuarial basis, some of the externalities of gun ownership and respond accordingly. Certifying gun abstinence would correct an information asymmetry that currently exists—an asymmetry that can cause market failures in risk management. The private sector could work in tandem with this program, reflecting the true societal costs of gun ownership. In addition, the program outlined here offers a

promising way to reduce the number of firearms in circulation without restricting gun sales to normal purchasers, or the activities of those who want to own guns.

Official certification as gunless would be irrevocable for a period of several years (i.e., five, if not more). If you do not happen to need or want a gun now, but you could conceive of needing or wanting one sometime in the next few years, this program is not for you. Gunless certification is for those of us who believe there is no circumstance in which we could ever need a gun—there are other ways (much better ways)—to avoid crime or injury besides arming oneself to kill others. Irrevocable commitments may be a foreign concept to many Americans today, but our legal system does recognize a few irrevocable, but voluntary, decisions. Enlistment in the military is extremely difficult to retract or revoke, even if the person has a complete change of heart and mind, or a dramatic change in family circumstances, as are some other opt-in and opt-out choices within the military.<sup>268</sup> Similarly, those who avail themselves of one of the Social Security opt-out alternatives, such as the optional exemption for ministers who have a conscientious objection to the Social Security program, cannot revoke their decision later, even if they change religion or denominational affiliation and want to participate in Social Security.<sup>269</sup> In the case of renouncing gun ownership, the permanence of the choice (at least for a term of years), is indispensable to give certification its force and verve as an effective signaling device, whether for peers in the movement, for oneself, or for the marketplace.

The time has come for conscientious people to renounce gun ownership for good. We need a different culture, a new mindset about relying on violence and physical force. We need ways to exemplify that we have vowed to abstain from arming ourselves to kill others in a moment of crisis. Change begins locally with individuals who are willing to publicly identify as legally gunless, creating a shift in the social norm of owning a gun. It is time for those who oppose the culture of militarism and violence to stand and identify themselves as persons who choose not to own guns. Registration and certification provide a legal mechanism for the gunless to do just that.

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<sup>268</sup> See, e.g., 10 U.S.C. §§ 510(f)–(g) (examples of irrevocable opt-in and opt-out provisions).

<sup>269</sup> See 26 U.S.C. § 1402(e)(4) (“An exemption received pursuant to this subsection shall be irrevocable.”).